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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 423

FRANK H. COONEY, AS GOVERNOR OF THE STATE OF MONTANA, ET AL., ETC., APPELLANTS,

vs.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA

FILED SEPTEMBER 27, 1934.

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IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

In Equity

No. 1495

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Plaintiff,

vs.

FRANK H. COONEY, as Governor of the State of Montana; RAYMOND T. NAGLE, as Attorney General of the State of Montana; and JAMES J. BRETT, as Treasurer of the State of Montana, Defendants

BILL OF COMPLAINTS—Filed Jan. 23, 1934

The Mountain States Telephone and Telegraph Company, a corporation, plaintiff, brings this, its bill of complaint against the defendants, Frank H. Cooney, as Governor of the State of Montana, Raymond T. Nagle, as Attorney General of the State of Montana, and James J. Brett, as Treasurer of the State of Montana, and, complaining of the defendants, says:

1. The plaintiff, The Mountain States Telephone and Telegraph Company, is a corporation duly created, organized and existing under and by virtue of the laws of the State of Colorado, with its principal office in the City and County of Denver, and State of Colorado, and is a citizen and resident of the State of Colorado, and is duly and lawfully authorized and qualified under the laws of the State of Montana, to do, and is now doing, a general telephone business within the State of Montana, and it now owns and operates, and at all times mentioned herein has owned and operated, a telephone system in the State of Montana, with all the proper appliances and appurtenances necessary to [fol. 4] the proper operation of such a system, and does

now, by said system, furnish telephone service of an interstate and intrastate character to the general public in the State of Montana.

2. The defendant, Frank H. Cooney, is the duly elected, qualified, and acting Governor of the State of Montana. The defendant, Raymond T. Nagle, is the duly elected, qualified, and acting legal advisor of the Governor of the State of Montana, and of the Treasurer of the State of Montana, and is the Attorney General of the State of Montana. The defendant, James J. Brett, is the duly elected, qualified, and acting Treasurer of the State of Montana. Each and all of the above-named defendants are citizens and residents of the State of Montana, and each and all of them are residents within the District of Montana.

3. This is a suit of a civil nature in equity, and is brought for the purpose of enjoining the enforcement of that certain statute passed by the Legislature of the State of Montana, and approved by the Governor of the State of Montana on the 16th day of March, 1933, and entitled "An Act Requiring Every Person, Firm, Copartnership, Association, Joint Stock Company, Syndicate and Corporation Engaged in or Carrying on the Business of Constructing, Maintaining and Operating Telephone Lines and Telephone Instruments Within the State of Montana to pay License taxes and Providing Penalties," being Chapter 174 of the Laws of Montana of 1933, as amended by an Act approved by the Governor of said state on the 20th day of January, 1934. A copy of said statute and a copy of the amendment are hereto annexed and made a part hereof as Exhibits "A" and "B" respectively.

4. That this suit involves a federal question and presents a substantial controversy arising under the Constitution and the laws of the United States, as will appear from the statements and allegations hereinafter made, and the amount in controversy, exclusive of interest and costs, exceeds the sum or value of $3,000.00.

5. That the State of Montana, under and by virtue of Section 14, of Article XV of the Constitution of said state, [fol. 5] and Sections 6645 and 6646 of the Revised Codes of Montana of 1921, granted to this plaintiff the right to maintain and operate telephone lines and a telephone system in the State of Montana, and for that purpose to set its

poles, piers, abutments, wires, and other fixtures, along, across or under any of the public roads, streets, or highways of the State of Montana, in such manner as not to incommode the public in the use of such roads, streets and highways, and that this plaintiff accepted said grant, and has constructed throughout the State of Montana, a comprehensive telephone system for the purpose of furnishing to the residents and citizens of the State of Montana, and to the people in Montana generally, communication services with other residents and citizens of Montana, and with residents and citizens of other states and foreign countries, and that now, and for many years past, this plaintiff has owned and operated a telephone system extending throughout the State of Montana, the States of Idaho, Utah, Wyoming, Colorado, Arizona, New Mexico, and part of Texas, and that the telephone system and instruments so owned and operated in Montana are now, and have been during the entire calendar year of 1933, and for many years prior thereto, an integral and organic part of its entire system and plant located throughout said states, and the business and operations carried on in Montana during the year 1933 and at the present time is a part of the general business of operating said systems in said several states and as a whole; that all of said property and all of said telephone instruments, amounting to approximately forty-four thousand, are an integral, organic and necessary part of a vast, comprehensive and extensive telephone system, extending throughout the United States, and to a great many foreign nations, and that each and every telephone instrument in the State of Montana, except 45 which are not effected by said statute, is maintained for the purpose of furnishing to the people in Montana, and to people throughout the United States, and in a great many foreign countries, facilities for immediate telephone communication; that in addition to the telephone service furnished by this plaintiff to the people of Montana, and of other states and countries, [fol. 6] this plaintiff has made, and there is now in force, arrangements with various telegraph companies doing an interstate business, to enable the people of Montana, and of other states and countries, to secure prompt and immediate delivery of telegraph messages by means of the telephone instruments of this plaintiff, and that the telephone instruments of this plaintiff now maintained and operated

by it in the State of Montana, with the exception stated, are being used by the people of the State of Montana for the prompt reception and delivery of such telegraphic messages, in addition to the reception and delivery of telephonic messages; that the same telephone instruments and other equipment owned and operated by this plaintiff at this time, and for many years past, which are used in furnishing local or exchange service between points, all of which are within the State of Montana, are also now used, and have been used during the entire calendar year of 1933, and for many years prior thereto, in furnishing such long distance, interstate and foreign telephone communications, and that in the rendition of said long distance service, each and every telephone instrument, with the exception of the said 45 instruments, and the continued maintenance and operation thereof are necessary and indispensable therefor.

6. That the enforcement of said statute and the collection of said tax would inflict and impose upon said interstate and foreign commerce a burden, in violation of and contrary to the commerce clause of the Constitution of the United States, being Article I, Section 8, Clause 3 of said Constitution.

7. That plaintiff is required, by virtue of the grant of the right to construct, maintain and operate said telephone system, to furnish local or exchange service to the people of Montana, and as it cannot abandon its local business in Montana, while continuing to conduct an interstate and foreign business, the imposition of such tax is a burden upon its interstate and foreign business, in violation of said commerce clause of the Constitution of the United States.

[fol. 7] 8. That said statute is unconstitutional and void in that it imposes a tax upon the right of this plaintiff to maintain said telephone system and conduct a telephone business in the State of Montana, thereby impairing the obligation of the contract of this plaintiff with the State of Montana, resulting from the acceptance of the said grant of the right to construct, maintain and operate said system and conduct said business, in violation of Section 10 of Article I of the Constitution of the United States.

9. That said statute is unconstitutional and void by reason of the exceptions therefrom of telephone instruments

as therein stated, in that this plaintiff is thereby denied the equal protection of the laws, in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and said statute is, for the same reason, in violation of the uniformity requirements of Section 11 of Article XII of the Constitution of Montana.

10. That said statute is unconstitutional and void in that the penalties imposed thereby are so severe and excessive as to deny to this plaintiff the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

11. That said statute is unconstitutional and void because of the amount of the exaction therein imposed, which is arbitrary, unreasonable and oppressive, and constitutes an unlawful taking of this plaintiff's property, without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, and the due process provisions of Article III, Section 27, of the Constitution of the State of Montana, and is a practical confiscation of this plaintiff's property, and interferes with the performance of its obligation to render a public utility service in the State of Montana, and in the other states in which it operates.

12. That said statute is unconstitutional and void, in that it directs the Treasurer of the State of Montana to pay moneys out of the treasury of the State of Montana without specific appropriations having been made therefor by law, as required by Section 10 of Article XII of the Montana Constitution.

[fol. 8] 13. That said statute is unconstitutional and void in that the amount thereby appropriated and to be credited to the emergency relief fund is not specified, as required by said Section 10 of Article XII of the Constitution of Montana.

14. That said statute is unconstitutional and void for the reason also that by authorizing the Governor to determine the amount of said tax to be credited to the emergency relief fund, there is a delegation of legislative power to said Governor, in violation of Section 1 of Article IV of the Constitution of Montana.

15. That said statute is unconstitutional and void for the further reason that the maintenance and operation of said telephone system is not a privilege but is a duty and obligation imposed upon plaintiff by virtue of the said grant and the acceptance thereof, and the imposition of said tax is in violation of the Constitution of Montana and particularly Section 1 of Article XII.

16. That said statute, without the amendment, is unconstitutional and void in that it deprives this plaintiff of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, by reason of the provision that the tax should in no manner affect the rates charged to the patrons and users of such telephone instruments, but shall be borne entirely by the owning and operating concern.

17. That said statute is unconstitutional and void, in that it is a special law for the assessment or collection of taxes, and violates the provisions of Article V, Section 26, of the Constitution of the State of Montana.

18. That as plaintiff is informed, believes and alleges, the defendants threaten to and will, unless enjoined from so doing by this Honorable Court, commence and prosecute, or cause to be commenced and prosecuted, an action or actions against this plaintiff to recover said tax, and commence or cause to be commenced criminal proceedings to enforce the penalties provided in said Act.

[fol. 9] 19. That this plaintiff has paid all general property taxes imposed by the State of Montana, and the political subdivisions thereof, upon all property of this plaintiff, including said telephone instruments, for the year 1933 and prior years, with the exception of one-half of the property taxes for the year 1933, which will not become delinquent until after the 31st day of May, 1934, and has also paid to the State of Montana all corporation license taxes due and payable under and by virtue of Sections 2296 to 2304 inclusive of the Revised Codes of Montana of 1921, as amended.

20. That more than 35,000 of said telephone instruments are affected by said statute, before the amendment thereof, in that the rates charged therefor are in excess of the rates mentioned in the proviso to Section 1 thereof, and

approximately 33,000 of said telephone instruments are affected by said statute, as amended, in that the rates therefor were and are in excess of the rates mentioned in Section 1 as amended, and more than 10,000 of said telephone instruments affected by said statute, as amended, were actually used for interstate and foreign communications during the year 1933.

21. That this plaintiff has no plain, adequate and complete remedy at law, or any remedy, except by the interposition of this court of equity.

In consideration whereof, and for as much as this plaintiff is without plain, adequate and complete remedy at law, or any remedy, save in this court of equity, plaintiff prays:

First. That the aforesaid statute passed by the Legislature, and approved by the Governor of the State of Montana on the 16th day of March, 1933, a copy of which statute is hereto attached and made a part hereof, and for identification marked Exhibit "A" and the amendment thereto, marked Exhibit "B", and all the taxes and penalties therein prescribed, be declared unconstitutional, void, and unenforceable as to and against this plaintiff; that the defendants herein, and each of them, their agents, servants and employees, and all persons acting under or [fol. 10] through their authority, or by virtue of the authority of their office, be enjoined and restrained in the enforcement and execution of said provisions of said statute, and the collection of, and in the attempt to collect, said taxes and penalties from this plaintiff, levied and imposed upon its property within the State of Montana, and that a hearing and determination shall be had herein by three judges, as provided by Section 380 of the United States Code Annotated (Judicial Code, Section 266, amended), for an interlocutory and permanent injunction, and that meanwhile and until the hearing and determination of the application for an interlocutory injunction, as aforesaid, the defendants, and each of them, their agents, servants, and employees, and all other persons acting under or through their authority, or by virtue of the authority of their office, be restrained by a temporary restraining order, as provided in said Section 380 of the United States Code Annotated, to prevent immediate, great and irreparable injury, loss and damage to the plaintiff, which will result, as afore-

said, and particularly with respect to the aforesaid heavy statutory penalties, before notice can be served, and a hearing had upon the application for an interlocutory injunction.

Second. That this plaintiff be granted such other and further relief, both general and special, as may be just and equitable.

And may it please Your Honor to grant unto the plaintiff a writ of subpœna of the United States of America, issuing out of and under the seal of this Honorable Court, directed to Frank H. Cooney, as Governor of the State of Montana, Raymond T. Nagle, as Attorney General of the State of Montana, and James J. Brett, as Treasurer of the State of Montana, enjoining them, and each of them, on a date certain therein to be named, and under a certain penalty, to be and appear before this Honorable Court, then and [fol. 11] there to answer, but not under oath, all and singular the premises, and to stand to perform or abide by such further direction and decree as shall be made against them in the premises.

Milton Smith, J. R. Turnquist, Gunn, Rasch, Hall & Gunn, Solicitors for Plaintiff. M. S. Gunn, of Counsel.

Duly sworn to by J. N. Whittinghill. Jurat omitted in printing.

[fol. 12] EXHIBIT "A" TO BILL OF COMPLAINT

An Act Requiring Every Person, Firm, Copartnership, Association, Joint Stock Company, Syndicate and Corporation Engaged in or Carrying on the Business of Constructing, Maintaining and Operating Telephone Lines and Telephone Instruments Within the State of Montana to Pay License Taxes and Providing Penalties

Be it enacted by the Legislative Assembly of the State of Montana:

Section 1. Every person, firm, copartnership, association, joint stock company, syndicate and corporation engaged in the business of operating or maintaining telephone lines

and furnishing telephone service in the State of Montana, whether as owner, lessee, trustee or receiver or in any other capacity, shall pay in to the State Treasurer on or before the first day of January each year a license tax in the amounts following for each telephone instrument used, controlled and operated by it in the conduct of such business, based upon the number of telephone instruments owned, controlled and operated by it during all or any part of the calendar year, to-wit: On the first twenty (20) telephone instruments or less a license tax of Ten Cents (10¢) per phone; from twenty (20) to seventy-five (75) such instruments a license tax of Twenty Cents (20¢) per phone, and on all above seventy-five (75) a license tax of One Dollar ($1.00) for each such instrument. The license tax so paid shall in no manner affect the rates charged to the patrons and users of such telephone instruments, but shall be borne entirely by the owning and operating concern. Provided, the tax herein provided for shall not be imposed on any telephone instrument where the rate charged the customer therefor does not exceed Two Dollars ($2.00) per month for residence phone, or Three Dollars ($3.00) per month for business house or office phone.

Section 2. A telephone instrument is hereby defined to be a transmitter and receiver capable of use in the transmitting and receiving of telephone communications.

Section 3. Any violation of any of the provisions of this Act shall be deemed a misdemeanor and shall be punished by fine of not more than One Thousand Dollars ($1,000) or by imprisonment in the county jail not exceeding six (6) months, or by both such fine and imprisonment.

Section 4. All license fees paid to the State Treasurer under the provisions of this Act shall be by him, before the end of each fiscal year, divided by the counties in this state according to the number of telephone instruments in use from time to time in the respective counties of the state and on each such computation and division the State Treasurer shall transmit the share of each county to the County Treasurer thereof, for the use and benefit of the county general fund.

Section 5. This Act shall be in full force and effect from and after its passage and approval.

Approved March 16, 1933.

[fol. 13] EXHIBIT "B" TO BILL OF COMPLAINT

An Act Amending Section 1, and Section 4, of Chapter 174, of the Session Laws of 1933, Requiring Every Person, Firm, Co-partnership, Association, Joint Stock Company, Syndicate and Corporation Engaged In or Carrying On the Business of Constructing, Maintaining and Operating Telephone Lines and Telephone Instruments Within the State of Montana, to Pay License Taxes and Providing Penalties

Be It Enacted by the Legislative Assembly of the State of Montana:

Section 1. That Section 1, of Chapter 174, of the Session Laws of 1933, be amended to read as follows:

"Section 1. Every person, firm, co-partnership, association, joint stock company, syndicate and corporation engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana, whether as owner, lessee, trustee or receiver or in any other capacity, shall pay in to the State Treasurer on or before the first day of March each year a license tax in the amounts following for each telephone instrument used, controlled and operated by it in the conduct of such business:

"A license tax of Two Dollars ($2.00) for each such instrument.

"No bill, statement or account rendered or given any customer by any telephone company shall set out or contain, as a separate item, any amount on account or by reason of the license tax imposed by this Act. Every person, firm, co-partnership, association, joint stock company, syndicate or any corporation affected by the provisions of this Act shall be permitted to claim as exempt from the tax imposed by this Act any telephone instrument where the rate charged the customer therefor does not exceed Two Dollars ($2.00) per month for residence phone, or Four Dollars ($4.00) per month for business house or office phone. Provided further, that the provisions of this Act shall not apply to mutual telephone companies or lines not [fols. 14 & 15] organized or used or operated for private or corporate gain."

Section 2. That Section 4, of Chapter 174, of the Session Laws of 1933, be amended to read as follows:

"Section 4. Five per centum (5%) of the license fees paid to the State Treasurer under this Act are hereby appropriated and shall be set aside by him for the purpose of defraying the cost of administering this Act by the State Board of Equalization, and the remaining ninety-five per centum (95%) thereof shall be by him credited to the Emergency Relief Fund until such time as the Governor may issue a proclamation to the effect that the same is no longer required for such Emergency Relief Fund, and after the issuance of such proclamation said ninety-five per centum (95%) of such license fees shall be by such State Treasurer credited to the General Fund of the State."

Section 3. No tax which has attached, accrued, or become due or payable under the provisions of Chapter 174, Session Laws, 1933, shall be released or waived by the passage or approval of this Act but the same shall be paid as provided in said Chapter before its amendment by this Act.

Section 4. This Act shall be in full force and effect from and after its passage and approval.

Approved Jan. 20, 1934.

[File endorsement omitted.]

[fols. 16 & 17] In United States District Court

[Title omitted]

Amendment to Bill of Complaint—Filed April 24, 1934

Now comes the plaintiff and by permission of court amends its bill of complaint by adding thereto paragraph 13a, reading as follows:

13a. That said statute is in violation of Section 5 of Article X of the Constitution of Montana, and therefore void for the reason that provision is made therein for crediting 95% of said tax to the "Emergency Relief Fund", which fund is for the sustenance of life and relief of dis-

tress among the people of the state, when economic conditions, industrial inactivity, or other cause, over which they have no control, has deprived of support, as provided in Chapter 20 of the Laws of Montana of the Extraordinary Session of 1933, and the furnishing of such relief is a duty and obligation resting upon the counties of the state, and for which the state is without power or authority to impose or collect taxes.

Further amends by substituting for paragraph 21 of said bill of complaint, the following:

21. That this plaintiff has no plain, adequate, or complete remedy at law, or any remedy, except by the payment of said tax under protest and an action to recover, as provided in Section 1 of Chapter 142 of the Laws of Montana of 1925, which remedy is wholly inadequate, for the reason that such statute provides, and as construed by the Supreme Court of the state in the case of Fulton Oil Co. v. Toole County, 86 Mont. 367, no interest shall be recovered on any payment as made.

Hilton Smith, Jr., J. R. Turnquist, Gunn, Rasch, Hall & Gunn, Solicitors for Plaintiff. M. S. Gunn, of Counsel.

[File endorsement omitted.]

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

JOINT ANSWER—Filed March 19, 1934

Come now the defendants, Frank H. Cooney, as Governor of the State of Montana, Raymond T. Nagle, as Attorney General of the State of Montana, and James J. Brett, as Treasurer of the State of Montana, and for their joint answer to the Bill of Complaint filed herein, admit, deny and allege:

I

Defendants admit the allegations contained in paragraphs numbered 1, 2, 3, 4, 18 and 19 of the Bill of Complaint.

II

Defendants admit the allegations contained in paragraph numbered 5 of the Bill of Complaint as far as the word "Texas" in line 16, page 3 of said Bill, and allege that they and each of them are without knowledge or information whether the telephone system or instruments owned and operated in Montana by the plaintiff are or have been during the year of 1933, an integral and organic [fol. 19] part of the entire system and plant located throughout the states of Idaho, Utah, Wyoming, Colorado, Arizona, New Mexico, and a part of Texas, and whether the business and operations of said plaintiff carried on in the State of Montana during the year 1933 and at the present time, is a part of the general business of operating said system in said several states as a whole; whether all of the property of the plaintiff and all of its telephone instruments, or any part thereof, in Montana, are an integral, organic and necessary part of a telephone system extending throughout the United States and to a great many foreign states, and whether each and every telephone instrument in the State of Montana, excepting forty-five (45), is maintained for the purpose of furnishing to the people of Montana and to the people throughout the United States and in many foreign countries facilities for immediate telephone communication; whether in addition to the telephone service furnished by this plaintiff to the people of the State of Montana and other states and countries, the plaintiff has made, or whether there is now in force arrangements with various telegraph companies doing an interstate business, to enable the people of Montana and of other states and countries to secure prompt and immediate delivery of telegraph messages by means of the telephone instruments of this plaintiff, or whether the telephone instruments of this plaintiff maintained and operated in the State of Montana, with the said exception, are being used by the people of the State of Montana for the prompt reception and delivery of such telegraph messages in addition to the reception and delivery of telephonic messages; whether the same telephone instruments and other equipment used and operated by this plaintiff at this time or for many years past, used in furnishing local exchange service between points within the State of

Montana, are also now used and have been used during the year 1933 or for many years prior thereto in furnish-
[fol. 20] ing such long distance interstate and foreign telephone communications; and whether in the rendition of said long distance service each and every telephone instrument, with the exception of the said forty-five instruments, is necessary and indispensible therefor in the continued maintenance and operation thereof, all as alleged in said paragraph 5, and therefore deny the same and deny each and every allegation of said paragraph not herein specifically admitted.

III

Defendants deny that the enforcement of the statute and the collection of the tax would inflict or impose any burden or undue burden upon the interstate and foreign commerce of the said plaintiff, and deny that it would be in violation of Article I, Sec. 8, Clause 3 of the Constitution of the United States, or otherwise, or in violation of or contrary to the commerce clause of the said Constitution, and deny each and every allegation of paragraph 6 of the Bill of Complaint.

IV

Defendants admit that the plaintiff is required to furnish local or exchange service to the people of Montana within the territory which it professes to serve, but not otherwise, and deny that plaintiff cannot abandon its local business in Montana while continuing to conduct an interstate and foreign business, and deny that the imposition of the said license tax provided in said statute is a burden upon plaintiff's interstate and foreign business in violation of the commerce clause of the Constitution of the United States, or otherwise; as alleged in paragraph 7 of the Bill of Complaint, and except as herein specifically admitted, deny each and every allegation thereof.

[fol. 21] V

Defendants deny that the said statute imposes a tax upon the right of the plaintiff to maintain a telephone system or to conduct a telephone business in the State of Montana, and deny that the obligation of the contract of this

plaintiff with the State of Montana is thereby or otherwise impaired, and deny that the said statute is for that reason, or any other reason, unconstitutional or void or in violation of Sec. 10 of Article I of the Constitution of the United States, or of any other provision thereof, as alleged in paragraph 8 of the said Bill of Complaint, and deny each and every allegation thereof.

VI

Defendants deny that by reason of the exceptions or exemptions of the telephone instruments as in said statute stated, or otherwise, the plaintiff is denied the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, and deny that said statute for said reason, or otherwise, is in violation of the uniformity requirements of Section 11 of Article XII of the Constitution of Montana, or any other provision thereof, and deny that the said statute is unconstitutional and void for the reasons stated in paragraph 9 of the said Bill of Complaint, or otherwise, and deny each and every allegation thereof.

VII

Defendants deny that the penalties imposed by said statute are severe or excessive, or are so severe or excessive as to deny the plaintiff the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States, and deny that the said statute for that reason, or otherwise, is unconstitutional and void, [fol. 22] as alleged in paragraph 10 of the Bill, and deny each and every allegation thereof.

VIII

Defendants deny that the said statute is unconstitutional and void because of the amount of the exaction therein imposed, or otherwise, and deny that said exaction is arbitrary, unreasonable or oppressive, and deny that said exaction constitutes a taking of plaintiff's property without due process of law, or that it is contrary to the Fourteenth Amendment to the Constitution of the United States, or of the due process provisions of Article III, Sec. 27 of the Constitution of the State of Montana, and deny that it is a

confiscation of plaintiff's property or interferes with the performance of plaintiff's obligation to render a public utilities service in the State of Montana, or in the other states in which it operates, as alleged in paragraph 11 of the Bill, and deny each and every allegation thereof.

IX

Defendants deny that said statute directs the treasurer of the State of Montana to pay moneys out of the treasury of the State of Montana without specific appropriations having been made therefor by law, as required by Section 10 of Article XII of the Montana Constitution, or otherwise, and deny that for that reason or any other, the said statute is unconstitutional and void as alleged in paragraph 12, and deny each and every allegation thereof.

X

Defendants deny that the amount appropriated by said statute and to be credited to the Emergency Relief Fund is not specified as required by Section 10 of Article XII of the Constitution of Montana, or otherwise, and deny that said statute is for that or any other reason unconstitu- [fol. 23] tional and void, as alleged in paragraph 13 of said Bill, and deny each and every allegation thereof.

XI

Defendants deny that the Governor is authorized to determine the amount of the tax to be credited to the Emergency Relief Fund, and deny there is a delegation of legislative power to the Governor by said statute, in violation of Sec. 1 of Article IV of the Constitution of Montana, or otherwise, and deny that said statute is for that reason unconstitutional and void, as alleged in paragraph 14 of said Bill, and deny each and every other allegation thereof.

XII

Defendants deny that the maintenance and operation of said telephone system is not a privilege, and deny that the maintenance and operation thereof is a duty and obligation imposed upon plaintiff, except admit that the maintenance and operation thereof is a duty and obligation imposed upon the plaintiff in the territory which it professes

to serve, and deny that the imposition of said tax is in violation of the Constitution of Montana, or of Section 1, Article XII thereof, or that it is unconstitutional and void for the reason alleged in paragraph 15 of the Bill, or otherwise, and deny each and every allegation not herein specifically admitted.

XIII

Defendants deny that the statute without amendment, by reason of the provision thereof that the tax should in no manner affect the rates charged to the patrons and users of such telephone instruments, but that it shall be borne entirely by the owning and operating concern, deprives the plaintiff of its property without due process of law in violation of the Fourteenth Amendment to the Con- [fol. 24] stitution of the United States, and deny that said statute is for that reason unconstitutional and void as alleged in paragraph 16 of the Bill, or otherwise, and deny each and every allegation thereof.

XIV

Defendants deny that the statute is a special law for the assessment or collection of taxes, and in violation of the provisions of Article V, Section 26 of the Constitution of the State of Montana, or otherwise, and deny that the statute is for that or any other reason unconstitutional and void, as alleged in paragraph 17, and deny each and every allegation thereof.

XV

Defendants allege that they and each of them have no knowledge or information whether 35,000 of said telephone instruments are affected by the statute before the amendment thereof, or how many of said telephone instruments are affected by said statute, or whether 35,000 of said telephone instruments are affected by the statute as amended, or what number of said telephone instruments are affected by the statute as amended, or whether more than 10,000 of the said telephone instruments, or what number of said telephone instruments affected by the statute as amended, were actually used for interstate and foreign communications during the year 1933, as alleged in paragraph 20 of the Bill, and therefore deny the same, and each and every allegation thereof.

XVI

Defendants deny that the plaintiff is without plain, adequate or complete remedy at law, or without any remedy except by the interposition of this court of equity.

[fols. 25 & 26] XVII

Except as hereinabove specifically admitted, denied or qualified, these answering defendants deny specifically each and every and all other allegations contained in said Bill of Complaint.

Wherefore the defendants pray that the plaintiff take nothing by its suit; that the Bill of Complaint herein be dismissed and that the defendants recover their costs of suit incurred herein.

Raymond T. Nagle, Attorney General for the State of Montana; Enor K. Matson, Assistant Attorney General, Solicitors for Defendants.

[File endorsement omitted.]

[fols. 27 & 28] In United States District Court

[Title omitted]

Amendment to Answer—Filed April 24, 1934

Come now the defendants and by permission of court amend their answer to the bill of complaint filed herein by adding thereto paragraph Xa, reading as follows:

Xa

Defendants deny that the furnishing of the funds for the Emergency Relief Fund as provided in Chapter 20, Laws of Montana of the Extraordinary Session of 1933, or by said Chapter 54 thereof, is a duty or obligation resting upon the counties of the State, and deny that the State is without power or authority to impose or collect taxes for said Emergency Relief Fund or for the purpose mentioned in said Chapter 54, and deny that for that reason or for the reasons mentioned in paragraph 13a of the bill of com-

plaint, or at all, the said statute is in violation of Section 5, Article X of the Constitution of Montana and void, and deny each and every allegation thereof.

Raymond T. Nagle, Attorney General; Enor K. Matson, Assistant Attorney General, Solicitors for Defendants.

[File endorsement omitted.]

[fol. 29] In United States District Court, District of Montana

No. 1495

The Mountain, etc., Telegraph Co.

vs.

Cooney, as Governor of Montana, et al.

Before Garrecht, Circuit Judge, and Pray and Bourquin, District Judges

Opinion—Filed May 21, 1934

Bourquin, District Judge:

In this suit to enjoin local taxes, the hearing is interlocutory and final.

The statute (33 Mont. Sess., Ch. 174, amended 33 Ex. Sess., Ch. 54) provides that all operating telephone lines and furnishing service in Montana shall pay for each phone used in such business, an occupation license tax for revenue of 20 cents to $2 per year, dependent upon the number of phones and rates charged.

Non-payment or/and shifting the burden to patrons may be heavily penalized. The receipts are to be credited to the state's emergency fund until the governor proclaims no longer so required, and thereafter to the general fund.

Plaintiff is a Colorado corporation owning and operating the only state-wide telephone system in Montana, employing over 34,000 phones subject to the tax, all of which are available for interstate and foreign communication by connection with 30,000,000 phones, and which have been and

are so used in number some 10,000 since the tax was imposed, increasing monthly, and in due time it is reasonably likely, all will be.

The interstate revenues are 4 to 8% of the total revenues by plaintiff received.

It pays the usual property taxes in Montana, and the corporation license or occupation taxes which are a percentage of its intrastate revenues.

In respect to the impost involved, its contention is it is obnoxious to many and doubtless all provisions of the Constitution, federal and state, even remotely applicable. [fol. 30] Briefs filed are anything but that, but we find it unnecessary to note and attempt to distinguish and reconcile the multitude of hair-line cases cited, leaving the task if feasible, to the court of them and to which appeal will be taken.

For it is clear that the suit is indistinguishable in principle from the Adams Express Case, 232 U. S. 14, and the Continental Oil Case, 256 U. S. 642, the rule of which condemns the tax for repugnancy to the Commerce Clause of the federal Constitution.

That is to say, said clause to congress reserves regulation of interstate and foreign commerce, the states have no power therein, a tax like to this at bar upon instrumentalities and not commodities is a burden upon such commerce and in legal effect a regulation of it, in consequence of which it is void.

In Adams Case, the city undertook to exact a license occupation tax for revenue in amount $5 per year upon express wagons. Adams doing interstate and intrastate express business with 341 wagons, brought suit like to this at bar to enjoin collection of the tax as in contravention of the Commerce Clause.

Sustaining the contention, Mr. Justice Hughes observed that though the tax might be construed to apply to intrastate business alone, yet as both varieties of business employed the same wagons and separation was impracticable, to constrain the company to pay the tax and secure a license because of its intrastate business, would be to virtually coerce it to pay a tax and secure a license to do its interstate business, and unconstitutional for reasons aforesaid.

In the Continental Case the state imposed a license occupation tax for revenue in amount $50 per year upon each

gasoline station. The oil company had 37 stations in the state, doing business interstate and intrastate, the former but 5.5% of the total, and brought suit like to this at bar.

Applying the rule of the Adams Case though not citing it, the tax was held void for that even if the state court would construe the tax to apply only to intrastate business, both varieties were necessarily done at any one station, and the tax on the intrastate business as a prerequisite to lawful business, was an impost upon the interstate business as well, illegal, and unenforceable against even the intrastate business.

[fol. 31] Both said cases are cited with approval in Sprout's Case, 277 U. S. 171, in support of Mr. Justice Brandeis' opinion that though a state may impose occupation taxes upon any engaged in both intrastate and interstate business, "in order that the fee or tax shall be valid it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business."

It may be granted that the tax at bar satisfies the first, second and third of the conditions aforesaid. That is, that the state court would so construe the statute.

See State vs. Tel. Co., 27 Mont. 394.

Nevertheless it fails in respect to the fourth of them.

For in this day and age it is clear separate state-wide systems for intrastate and interstate phones are not feasible, hardly possible, and to deny the proprietor of the latter the right to also operate the former would so heavily handicap and burden him, it would virtually destroy his business, burden and destroy interstate communication or commerce.

Even as in the Adams and Continental Case-, herein separation is impracticable, combination is necessary; and citing those cases to his conditions, by his fourth thereof Mr. Justice Brandeis evidently means that withdrawal to escape the tax must be practicable and combination not necessary, or the tax is invalid.

It is somewhat surprising that in imposing taxes on corporations like plaintiff, legislatures so often transgress the Commerce Clause. For as the Supreme Court has often

observed, be they not taxed sufficiently, there are many ways to impose a valid tax upon their intrastate business without affecting their interstate business. In interstate and intrastate rate regulation is clear analogy.

The principle of said cases is that a burdensome state occupation tax on instrumentalities necessarily used in both interstate and intrastate commerce is a regulation of the former and invalid; and a trial court can do better or worse than to align with it, however the personnel or views of the appellate tribunal may change.

[fols. 32 & 33] Indeed, Montana resorts to one of them in the corporation license or occupation tax which plaintiff pays.

Perhaps as curious a way as any to escape running foul of the Commerce Clause and upheld by the Supreme Court, is that of Edelman's Case, 289 U. S. 249.

In that case, the corporation imported and stored gasoline for its own use intrastate and interstate. The state imposed a license tax of 4 cents per gallon upon the "use" of gasoline within it. And the court held that as the state administered the law as a tax on the "use" of the gasoline in withdrawing it from storage and putting it in the intrastate planes, the tax is valid. Carried to its logical conclusion, interstate commerce can be strategically subjected to any tax.

If the rule be sound, why would not the tax at bar be valid had the statute declared it imposed upon the phones "used" by lifting them from the bracket and before interstate communication commenced, or be valid do the state officers so construe it? But they have not.

It is hardly necessary to repeat the tax is a privilege or occupation tax and not a property tax. If it were the latter, however, it would be invalid for contravention of the state constitution that it shall be levied at a uniform rate upon just valuation.

Decree for plaintiff.

[File endorsement omitted.]

[fols. 34 & 35] In United States District Court

[Title omitted]

Dissenting Opinion—Filed May 21, 1934

Garrecht, Circuit Judge, dissenting:

The license in question is nothing more than a tax. The penalty provided is but a mode of enforcing its payment. There is no restriction upon business in interstate commerce. From the record it appears that the fee or tax is imposed solely on account of the intrastate business. The amount exacted is not increased because of the interstate business done. One engaged exclusively in interstate commerce would not be subject to the imposition. The plaintiff could discontinue the intrastate business without withdrawing also from interstate business. It is assumed in the opinion that to require the plaintiff, in order to save the tax, to discontinue its intrastate business would impose too great a burden upon it. If business done wholly within a state is within the taxing power of the state, the courts of the United States cannot review or correct the action of the state in the exercise of that power. Resultant hardship is not within their province to redress. Postal Telegraph-Cable Co. vs. Charleston City Counsil, 153 U. S. 692; Postal Telegraph-Cable Co. vs. Richmond, 249 U. S. 252, 257.

[File endorsement omitted.]

[fol. 36] In United States District Court, District of Montana

In Equity

No. 1495

The Mountain States Telephone and Telegraph Company, a Corporation, Plaintiff,

vs.

Frank H. Cooney, as Governor of the State of Montana; Raymond T. Nagle, as Attorney General of the State of Montana; and James J. Brett, as Treasurer of the State of Montana, Defendants

Findings of Fact, Conclusions of Law, and Decree—Filed May 31, 1934

This cause having come on regularly for hearing on April 24, 1934, before Garrecht, Circuit Judge, and Bour-

quin and Pray, District Judges, constituting a three-judge court, convened pursuant to the provisions of Section 380 of the U. S. Codes Annotated, at Helena, Montana, upon the application of the plaintiff for an interlocutory injunction enjoining the defendants from enforcing or attempting to enforce against the plaintiff the provisions of Chapter 174 of the Montana Session Laws of 1933, and as amended by Chapter 54 of the Special Session of 1933, and at the conclusion of the hearing said cause having been submitted for final decision and decree, and the Court having considered the pleadings and evidence, makes findings of fact, conclusions of law, and renders its decree, as follows:

[fol. 37] FINDINGS OF FACT

1. That the plaintiff is a Colorado corporation, duly authorized and qualified under the laws of the State of Montana to do, and is now doing, and at all times mentioned in the complaint was doing, a general telephone business, and owns and operates a telephone system in Montana, furnishing thereby telephone service of an interstate and intrastate character to the general public in Montana.

2. That the defendant Frank H. Cooney is the Governor of the State of Montana; that the defendant Raymond T. Nagle is the Attorney General of the State of Montana; that the defendant James J. Brett is the Treasurer of the State of Montana; all citizens of the State of Montana.

3. That this suit was brought to enjoin defendants from enforcing the statute enacted by the Legislature of the State of Montana, and approved by the Governor on March 16, 1933, entitled:

"An Act requiring every person, firm, co-partnership, association, joint stock company, syndicate and corporation engaged in or carrying on the business of constructing, maintaining and operating telephone lines and telephone instruments within the State of Montana to pay license taxes and providing penalties,"

being Chapter 174 of the laws of Montana, 1933, which was subsequently amended by an act approved by the Governor on January 20, 1934, being Chapter 54 of the Session Laws of the Extra Session of 1933.

4. That the State of Montana, under and by virtue of Section 14, Article XV, of the Constitution of the state, and Sections 6645 and 6646 of the Revised Codes of 1921, granted to the plaintiff the right to maintain and operate telephone lines and a telephone system in the State of Montana, and the plaintiff has accepted that grant, and has constructed throughout Montana a comprehensive telephone system, and now owns and operates a state-wide telephone system in Montana.

[fol. 38] 5. That the telephone system owned and operated by the plaintiff extends throughout Montana, Idaho, Utah, Wyoming, Colorado, Arizona, New Mexico, and a part of Texas, and the telephone instruments in Montana are an integral part of this system, and are a part of a great system extending throughout the United States, and to a great many foreign countries, and each of these telephones (except 45 not affected by said statute) is available for interstate and foreign communication by connection with some 30,000,000 telephones throughout the entire system; that of these telephones in Montana, over 34,000 are affected by this statute, and of these 34,000, more than 10,000 have actually been used in interstate and foreign commerce since the statute in question was enacted, and in due time it is reasonably likely that all telephone instruments maintained and operated by the plaintiff in the state, as a part of this system, will be so used in interstate and foreign commerce.

6. That the plaintiff pays the usual property taxes in Montana, and also pays the corporation license, or occupation taxes, which are a percentage of its intrastate revenues.

7. That defendants, unless enjoined, will commence and prosecute, or cause to be commenced and prosecuted, actions against the plaintiff to recover said tax, and/or to enforce the penalties provided in said act.

8. That of the telephones which the plaintiff maintains in Montana, affected by this statute, any and all may be used in interstate and foreign commerce by the subscriber or user or by any individual using any of the 30,000,000 telephones so connected as aforesaid.

9. That all of said telephones constituting a part of said system in Montana are instrumentalities of interstate and

[fol. 39 & 40] foreign commerce, and plaintiff could not discontinue its intrastate business and operations in Montana without virtually destroying and being compelled to abandon and withdraw from its interstate and foreign business.

CONCLUSIONS OF LAW

1. That the court has jurisdiction of the subject-matter of this suit, and the parties herein.

2. That Chapter 174 of the Session Laws of Montana, 1933, as originally enacted, and as amended by Chapter 54 of the Session Laws of the Extra Session, 1933, is in violation of Article I, Section 8, Clause 3, of the Constitution of the United States, in that it imposes a burden upon, and constitutes a regulation of, interstate and foreign commerce.

DECREE

It is therefore ordered, adjudged and decreed that the defendants and each of them, and any and all persons acting in aid or assistance of them, or either of them, be and they and each of them are hereby permanently enjoined from taking any action against the plaintiff to enforce against the plaintiff the provisions of Chapter 174 of the Session Laws of Montana of 1933, or said Act as amended by Chapter 54 of the Session Laws of the Extra Session of 1933, and from collecting or attempting to collect any tax or enforce, or attempting to enforce any penalty provided for therein.

Dated this 29 day of May, 1934.

Bourquin, for the Court.

[File endorsement omitted.]

[fols. 41 & 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed July 10, 1934

To the Honorable District Court of the United States, District of Montana, and to the Honorable Judges Thereof:

The above named defendants, and each and all of them, feeling aggrieved by the permanent injunction decree and

order made and entered in this cause on the 29th day of May, 1934, do hereby appeal from said injunction decree and order, to the Supreme Court of the United States, for the reasons specified in the Assignment of Errors, which is filed herewith, and they, and each of them, pray that this appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree and order was based, duly authenticated, may be sent to the Supreme Court of the United States, Washington, D. C., under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the security to be required of them to perfect their appeal, be made.

Raymond T. Nagle, Attorney General; Enor K. Matson, Assistant Attorney General, Solicitors for Defendants and Appellants.

[File endorsement omitted.]

[fol. 43] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 10, 1934

Come now the above named defendants, Frank H. Cooney, as Governor of the State of Montana; Raymond T. Nagle, as Attorney General of the State of Montana; and James J. Brett, as Treasurer of the State of Montana, jointly and severally by and through their counsel and solicitors, Raymond T. Nagle and Enor K. Matson, and respectfully submit the following Assignment of Errors upon which they rely in support of their appeal from the permanent injunction order and decree made and entered on the 29th day of May, 1934, in said cause in the United States District Court for the District of Montana, and under which Assignment of Errors said appellants seek reversal of the decree and order of said Court:

I

The Court erred in finding that any and all of the telephones which the plaintiff maintains in the State of Montana may be used in interstate or foreign commerce for the

reason that the evidence presented is insufficient to support such finding.

II

The Court erred in finding that all of the telephones con- [fol. 44] stituting a part of the plaintiff's telephone system in Montana, are instrumentalities of interstate and foreign commerce for the reason that the evidence presented is insufficient to support such finding.

III

The Court erred in holding and finding that plaintiff could not discontinue its intrastate business and operations in Montana without virtually destroying and being compelled to abandon and withdraw from its interstate and foreign business for the reason that the evidence presented is insufficient to support such holding and finding.

IV

The Court erred in holding that Chapter 174 of the Session Laws of Montana 1933, as originally enacted, and as amended by Chapter 54 of the Session Laws of the Extraordinary Session 1933-4, is in violation of Article I, Section 8, Clause 3 of the Constitution of the United States, in that it imposes a burden upon and constitutes a regulation of interstate and foreign commerce, the evidence being insufficient to support such holding or finding and it appearing that said act, and as amended, levies a tax solely upon or on account of the intrastate business of the plaintiff, and it imposes no tax restriction or burden upon or on account of the interstate or foreign business of the plaintiff.

V

The Court erred in rendering a decree for the plaintiff herein permanently enjoining and restraining the defendants, and each of them, and any and all persos acting in aid or assistance of them, or either of them, from taking any action against the plaintiff to enforce against the plaintiff the provisions of Chapter 174 of the Session Laws of Montana of 1933, and as amended by Chapter 54 of the Session Laws of the Extraordinary Session of 1933-4, and [fols. 45-50] from collecting or attempting to collect any

tax, or enforcing or attempting to enforce any penalty provided for therein, on the ground that said act, and as amended, is in violation of Article 1, Section 8, Clause 3, of the Constitution of the United States, in that it imposes a burden upon, and constitutes a regulation of interstate and foreign commerce as said act, and as amended, levies a tax solely upon the intrastate business of the said plaintiff, and it imposes no tax restriction or burden upon or on account of the interstate or foreign business or commerce of the plaintiff.

VI

The Court erred in failing to dismiss the bill of complaint inasmuch as said act, and as amended, is valid as it merely levies or attempts to levy a tax solely upon, or on account of the intrastate business of the plaintiff and it imposes no tax restriction or burden upon the interstate or foreign business or commerce of the plaintiff.

Wherefore, defendants pray that the said permanent injunction decree and order be reversed and set aside, that said injunction be dissolved and for such other and further relief as to the court may seem just and proper.

Dated at Helena, Montana, this 10th day of July, 1934.

Raymond T. Nagle, Attorney General; Enor K. Matson, Assistant Attorney General, Solicitors for Defendants and Appellants.

[File endorsement omitted.]

[fol. 51] In United States District Court

Order Allowing Appeal—Filed July 10, 1934

The petition of the defendants and appellants above named, for an appeal in the above entitled cause to the Supreme Court of the United States from the judgment of the District Court of the United States, for the District of Montana, having been filed herein, accompanied by an Assignment of Errors and statement as to jurisdiction,

all as provided by Rules 9 and 12 of the Rules of the United States Supreme Court, and the said papers having been presented to this court and the record in this cause having been considered;

It is hereby ordered that an appeal be, and it is hereby allowed to the Supreme Court of the United States from the permanent injunction decree and order of the District Court of the United States, for the District of Montana, entered in this cause on the 29th day of May, 1934, and that the Clerk of the said District Court of the United States, for the District of Montana, shall, within sixty days from this date, make and transmit to the Supreme Court of the [fols. 52 & 53] United States, under his hand and the seal of the Court, a true copy of the material parts of the record herein, which shall be designated by praecipe or a stipulation of the parties, or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further ordered that the said appellants shall give a good and sufficient cost bond in the sum of One Thousand Dollars ($1,000), conditioned as required by law.

Done by this Court this 10th day of July, 1934.

Charles N. Pray, District Judge.

[File endorsement omitted.]

[fols. 54-59] Citation in usual form showing service on Gunn, Rasch, Hall & Gunn, filed July 11, 1934, omitted in printing.

[fols. 60-62] Bond on Appeal for $1,000.00, approved and filed July 12, 1934, omitted in printing.

[fols. 63 & 64] In United States District Court

[Title omitted]

Stipulation re Approval of Statement of Evidence—Filed July 25, 1934

It is hereby stipulated and agreed by and between Milton Smith, Jr., J. R. Turnquist, Denver, Colorado, and Gunn,

Rasch, Hall and Gunn, Helena, Montana, Solicitors for Plaintiff, and Raymond T. Nagle, Attorney General, and Enor K. Matson, Assistant Attorney General, Solicitors for Defendants, that the proposed statement of evidence lodged with the Clerk of the above entitled Court on July 25, 1934, by the defendants above named, is agreed to as a correct statement under paragraph B of Equity Rule 75, and may be approved by the above entitled Court, or Judge thereof, without further notice.

Dated at Helena, Montana, this 25 day of July, 1934.

Milton Smith, Jr., J. R. Turnquist, Gunn, Rasch, Hall & Gunn, Solicitors for Plaintiff. Raymond T. Nagle, Attorney General; Enor K. Matson, Assistant Attorney General, Solicitors for Defendants.

[File endorsement omitted.]

[fols. 65 & 66] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER APPROVING STATEMENT OF EVIDENCE—Filed Aug. 2, 1934

On this 2nd day of August, 1934, came on for consideration the matter of approval of the Statement of Evidence lodged herein by defendants and appellants above named, and it appearing to the Court that the ten days' notice of this hearing has been given to the plaintiff as required by Equity Rule 75, and it further appearing that the parties hereto have filed their written stipulation herein, agreeing that said Statement of Evidence is a correct statement under paragraph B of Equity Rule 75, and it further appearing that such statement is true, complete and properly prepared;

It is ordered by the Court that the same be, and is hereby approved as part of the record herein for the purpose of the defendants' appeal to the Supreme Court of the United States.

Charles N. Pray, District Judge.

[File endorsement omitted.]

[fol. 67] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

In Equity

No. 1495

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Plaintiff,

vs.

FRANK H. COONEY, as Governor of the State of Montana; Raymond T. Nagle, as Attorney General of the State of Montana; and James J. Brett, as Treasurer of the State of Montana, Defendants

Statement of Evidence—Filed Aug. 2, 1934

Be it remembered that the above entitled cause came on regularly for hearing upon the merits before the above entitled Court sitting in equity, Honorable Francis A. Garrecht, Circuit Judge, Honorable George M. Bourquin and Honorable Charles N. Pray, District Judges, presiding, on the 24th day of April, 1934, upon the issues formed by the plaintiff's complaint and the answer thereto, Gunn, Rasch, Hall & Gunn and J. R. Turnquist appearing as counsel for plaintiff, and Raymond T. Nagle, Attorney General of the State of Montana, and Enor K. Matson, Assistant Attorney General of the State of Montana, appearing as counsel for defendants.

That the following is a true and complete transcript of all the evidence or the substance of all the evidence introduced on the trial of said cause, and all of the rulings of [fol. 68] said Court made and entered therein during the trial of said cause.

PLAINTIFF'S CASE

Testimony of R. M. Morris

R. M. MORRIS was duly sworn and testified on behalf of the plaintiff as follows:

Direct examination:

My name is R. M. Morris; age 47; residence, Denver, Colorado; employed by the Mountain States Telephone and

Telegraph Company as assistant vice-president. My duties as such officer are: I have charge of all the commercial activities of the company, which operates in all or part of eight states. Briefly, that involves all the business relations with customers; the maintenance of business offices; the sale of service; the matter of collections, routines, and records that go with the performance of those operations; the development and publishing of all tariffs, rates, rules and regulations, and practices controlling commercial operations; and the negotiating with other telephone companies, associated companies, and telegraph companies, the interchange of traffic agreements, publish directories and matters of that kind.

I was made assistant vice-president in 1929. I have had, however, practically the same capacity since 1923, though under a different title—general commercial manager. As for my connection with the part of that system located in Montana, I was located in Montana with headquarters in Helena. I lived in Helena two and one-half years—from about the middle of 1917 to January, 1920. I was then division commercial superintendent. The division at that time [fol. 69] included all the State of Montana and the northern half of Wyoming.

There are over 34,000 telephone instruments for which a rate was charged a customer of more than $2 per month for residence and more than $3 per month for business or office telephone, which were used, controlled, and operated by the company in Montana from March 16, 1933, to January 1, 1934. There were approximately 29,000 telephone instruments for which a rate was charged a customer of more than $2 per month for residence telephone and more than $4 per month for business or office telephone, which were used, controlled, and operated by the company in Montana from January 1, 1934, to March 1, 1934.

The 34,000 and the 29,000 are the same telephones. I make the separation because there are two Acts. An Act was passed by the assembly in 1933 imposing a tax of $1 a telephone upon all telephones where the charge was in excess of $2 for residence telephones and in excess of $3 for business telephones. That was up to January 1, 1934. Then the Act was amended at the Extraordinary Session by an Act going into effect, I think, January 19th, increasing that tax on business telephones to $2 a telephone, and

providing that the old Act should control as to the license prior to January 1, 1934. For that reason we deemed it important to make the segregation and show the number of telephones used up to January 1, 1934, and the number between January 1, 1934, and March 1st, the date the license Act becomes due under the new Act.

By Mr. Gunn:

These are the same telephones. The amount, however, was reduced by reason of the increase from $3 to $4.

Over 10,000 of these instruments that I have testified were being used by the company between March 16, 1933, [fol. 70] and January 1, 1934, were actually used during that period for interstate communication. There were 2,108 of these telephones used in interstate commerce from January 1, 1934, to March 20, 1934.

"Judge Bourquin: I thought you said there were over ten thousand.

"The Witness: There are two periods again, Your Honor. From March 16th to January 1, 1934, there were over 10,000. From that date to March 20, 1934, there were 2,108 additional telephones, not theretofore used in interstate commerce, which were used during that period."

This does not include all the telephones actually used in interstate commerce, only those affected by the Act. It does not include all that terminated in Montana. Prior to December we did not tabulate the telephone calls which originated in states outside of Montana and terminated in telephones in the State of Montana. This was not done for the reason that our regular system of accounting prescribed by the Interstate Commerce Commission does not require that we set up in current operation that information, and in the normal conduct of our business we have no use for it. So we had to secure this by special study. The routine for obtaining this data required that we organize a special force to secure special tallies of all of that inpaid business. We have, of course, no regular record of it. By inpaid business I mean business originating out of Montana and terminating in Montana and paid for at the originating point.

We have, of course, the original toll tickets, which are the slips of paper on which the toll operators designate the

data from which we bill our toll charges. To obtain the [fol. 71] data we had all those tickets analyzed and tabulated. We showed those that indicated that the call originated in Montana and terminated outside Montana on a paid basis, or originated in Montana on a collect basis and terminated outside of Montana. We showed also those that originated outside of Montana and terminated in Montana or paid—or "in collect" as we call it—in Montana. They bear the dates, the originating point, the number, the time of day, and other information of that sort.

The telephone instruments constituting a part of the system in Montana are used in interstate and international telegraphic communication in the following manner: We have an arrangement with the Western Union and the Postal whereby, with any exchange in any city or town in which we operate a telephone exchange and in which they operate a telegraph business, any person can originate at any telephone in the State of Montana through those exchanges a telegram, cablegram or radiogram to any point in which they operate in Montana, or outside of Montana, or anywhere in the world. Calls originating on their system—telegrams originating on their system—may, on that agreement, be delivered to any telephone in any of these exchanges in Montana, whether the telegram originates in Montana or elsewhere throughout their system.

There are over thirty-two million telephones in the world. There are approximately sixteen million six hundred thousand telephones in the United States.

The plaintiff, the Mountain States Telephone and Telegraph Company, is a subsidiary of the American Telephone and Telegraph Company—the Bell System. There are [fol. 72] twenty-four other companies in the Bell System. We have a contract through the American company that provides for the complete interchange of traffic to or from all telephones in the Bell System.

I gave the number of telephones in the United States. Over thirteen million one hundred thousand of those telephones belong to the Bell System. There are over thirty-two million telephones in the world. Through our system in Montana we have direct connection with approximately thirty million—over 92 per cent—of those telephones. We have traffic arrangements by which we can serve that many telephones anywhere, at rates prescribed covering such

service. We have traffic arrangements, as I have mentioned, through the Bell System. As far as transoceanic and international service is concerned, this— Well, as far as associated companies are concerned, we publish the tariff, of course, from the Denver office.

We also have an arrangement with companies in the United States not a part of the Bell System, by which we have an exchange of traffic. There are approximately 6,700 other connecting companies, operating approximately three and a half million telephones, with which we have traffic arrangements for the interchange of traffic. Some directly; that is, those located in the State of Montana, we have direct agreements with. There are 64 of those. Elsewhere throughout the United States we secure our contract right through the agreement of the American company, which provides that we can interchange traffic over the entire system, including these three and a half million telephones of connecting companies.

Fifty of these sixty-four companies in Montana charge rates not to exceed $2 for house telephones and $4 for busi- [fol. 73] ness house or office telephones. Fourteen are affected by the statute as to such rates as go over those minimums.

The plat or map, marked for identification, "Plaintiff's Exhibit No. 1," is built up, briefly, to show the physical characteristics of the system in the State of Montana. Some of these parallelograms, the solid ones, have names on them indicating points at which the Mountain States owns and operates telephone exchanges. From these points are the radiating subscribers' lines. There are forty-four of those that are not indicated on the map. The parallelograms with broken lines represent some of the connecting companies which I mentioned, existing in Montana. The lines connecting the exchanges, or the parallelograms, indicate the number of telephone channels over which you can talk in, out, or through the State of Montana, starting from any particular telephone.

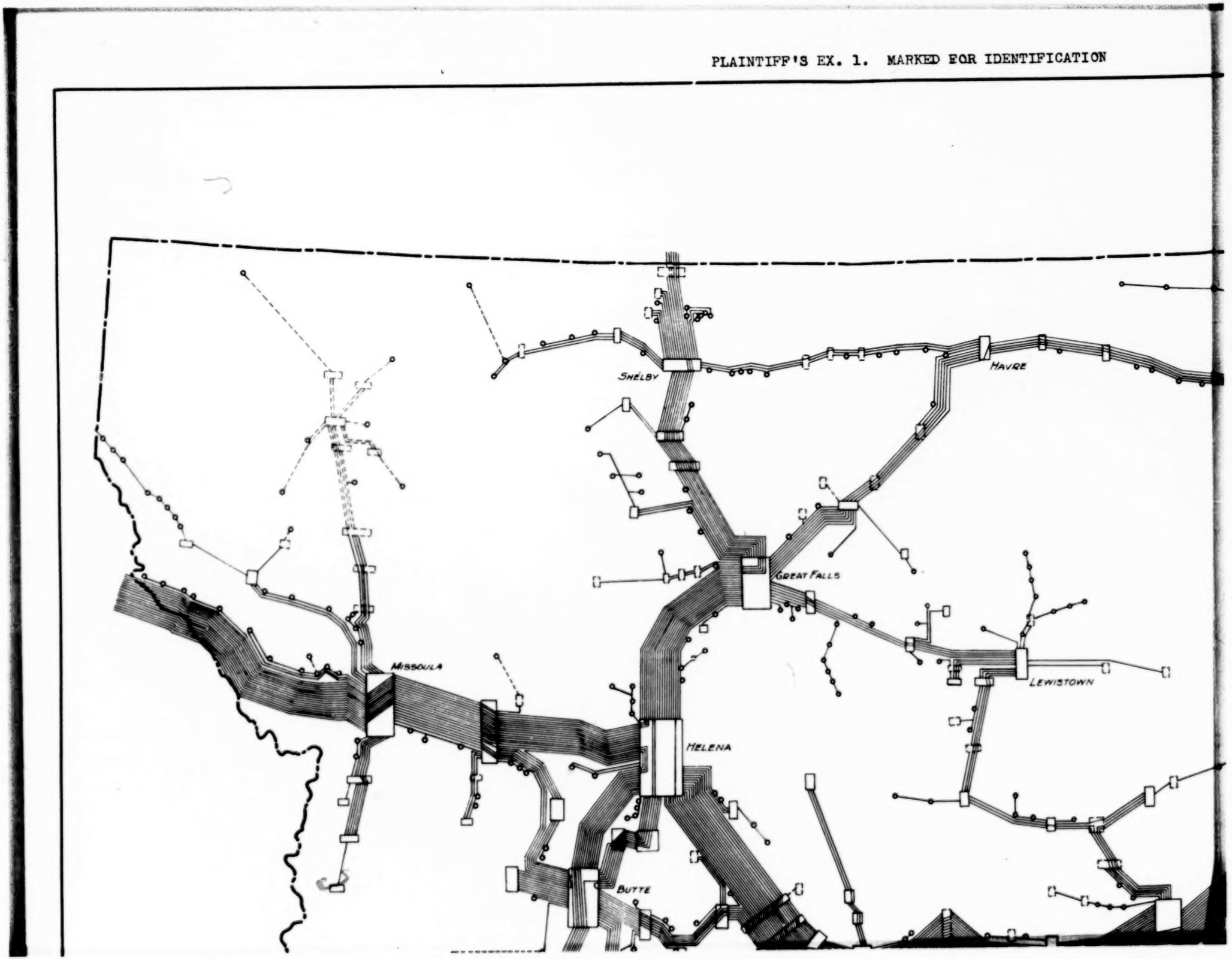
It is evident, therefore, that there is a continuous physical structure to any other telephone within the State with which you may desire communication, and that the same kind of structures exist in other States throughout the United States, so that it is possible from any one telephone to have a continuous channel for communication to any

other telephone located throughout the world. The lines indicate the more or less inseparability of the exchange and toll plant. It is necessary, of course, by the nature of the business, that we establish connections between customers. We do not deliver packages or anything that you can move about. So the structure must be continuous and inseparable.

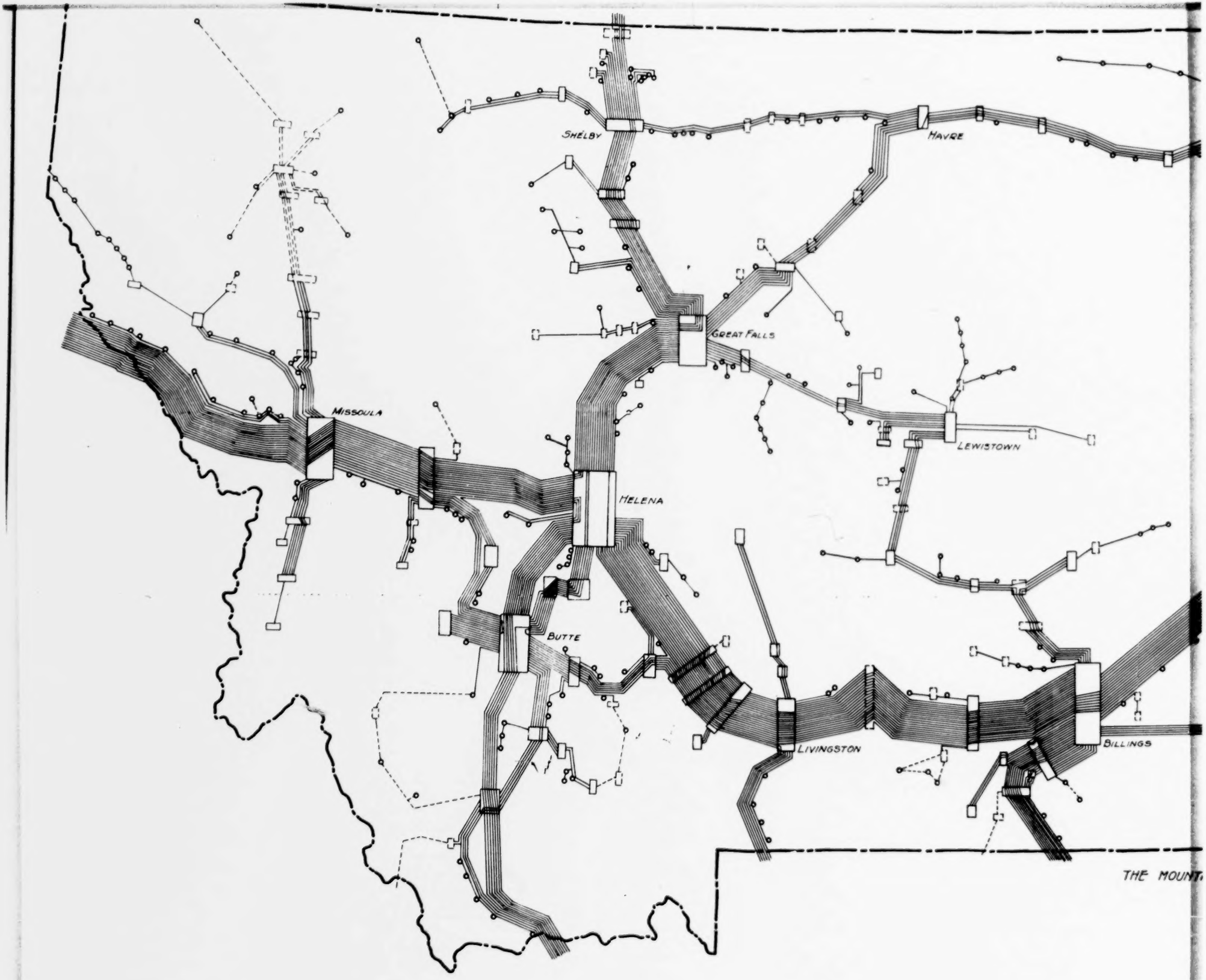
The first interstate line in Montana was opened for public use September 3, 1899. Our company has eighty-[fol. 74] four interstate lines at this time.

The map was here offered in evidence.

PLAINTIFF'S EX. 1. MARKED FOR IDENTIFICATION



PLAINTIFF'S EX. 1. MARKED FOR IDENTIFICATION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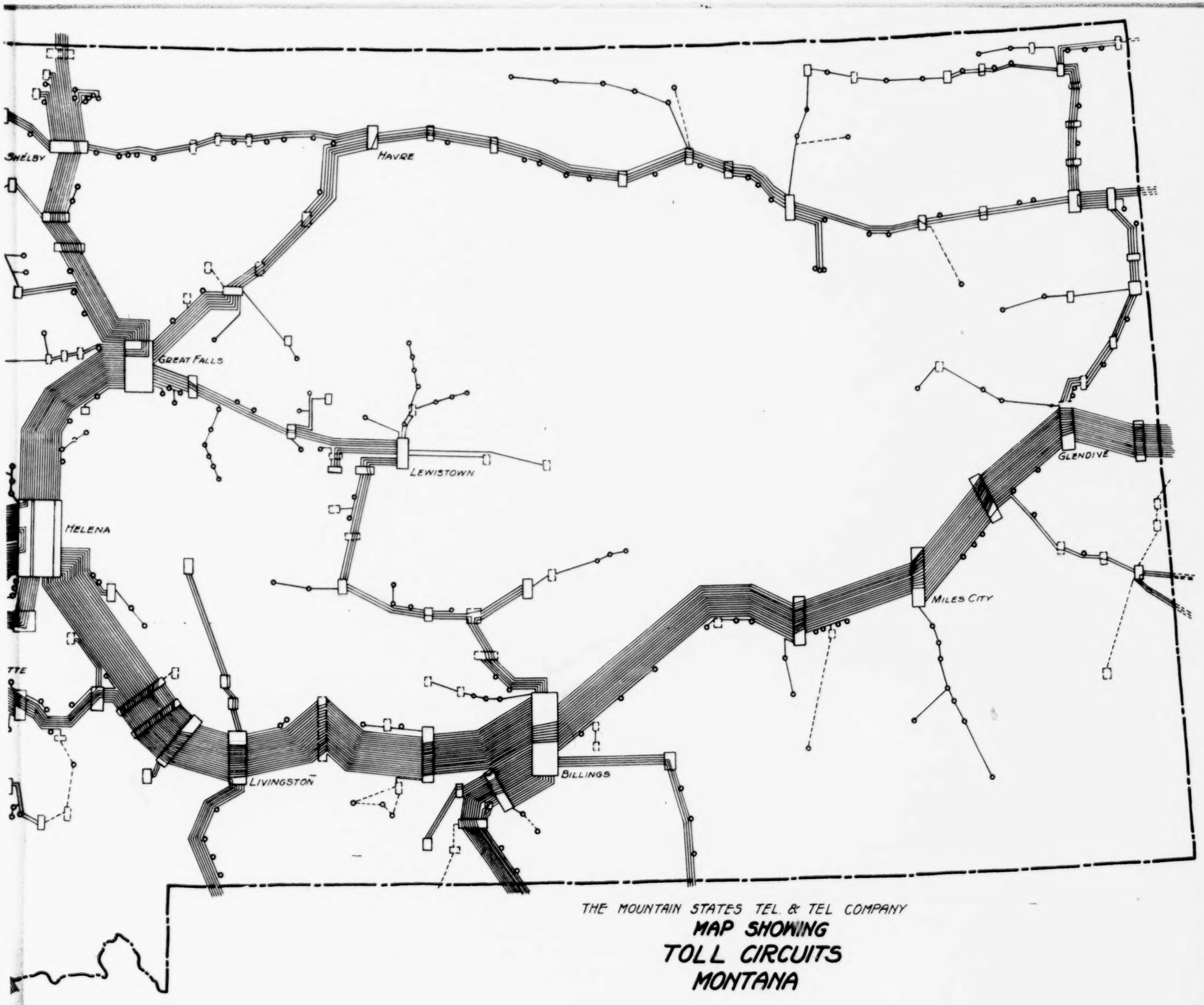
THE MOUNT.



THE MOUNTAIN STATES TEL. & TEL COMPANY

MAP SHOWING TOLL CIRCUITS MONTANA

"Q. State whether it would not be possible or practicable to separate your Montana business from your interstate business, or your international business.

"Mr. Matson: We object to that as calling for the conclusion of the witness. That is for the Court to determine.

"Judge Garrecht: The objection is overruled.

"Mr. Matson: Note an exception, please."

It would not be possible to operate separately these two classes of service, because, as I indicated there on the map, the same telephone, the same signaling apparatus, the wires in the building, the drop wires to the cables, and the cables, poles, wires, and underground wires we have in the streets and alleys between our customers and telephone and central-office equipment, are used for all classes of service. It is common usage. Largely, your land, buildings, central-office equipment and operating organization is used in common for all services. We think it is obvious to any one with experience that to separate those classes of service would require a hundred per cent duplication of outside distribution plant and telephones, and a large part of duplication of the central-office equipment. The attendant expense of such a disconnected operation would substantially destroy telephone service as it is known today. Your prices would become prohibitive. There are about forty-five private lines or telephones in Montana that are not connected [fol. 75] with the interstate system or cannot be used for interstate communication. They are not even connected with the system.

There is only one instrument and that has to be used for everything. That includes the delivery of telegrams as well.

Eight hundred ninety-seven telephones were used in interstate communication in the month of February of this year which have not been used in interstate communication during the prior period from March 16, 1933. The increase of additional telephones for the month of March was eight hundred twenty-seven. I should like to state there, to get it technically correct, that that is the toll-billing period, ending on the 20th of each month. The question was the calendar month. It is from the 21st of one month to the 20th of the other month. Approximately eight hundred is very close to the average number of additional telephones

used in interstate communication each month in our system. I might explain, if I may, that we have no current record. Therefore we had to start in, following the establishment of this Act, to get evidence so that we would know as a fact how these instruments appeared in interstate commerce usage. We started from nothing, and it has gradually built up, eight or nine hundred a month, until over this period we come to this last date. We come, as a matter of fact, to over 12,000 in toto. Each month adds to that at the rate of about eight hundred. So it is evident to me, from this and my contact with previous studies I have made, that it is only a question of time until practically every instrument in the State of Montana will have been used in interstate commerce. As you approach 100 per cent, of course, the curve will flatten out. It will naturally [fol. 76] become less, because there will be some instrument that persists in no interstate usage. Of course, eventually, practically every one will be used.

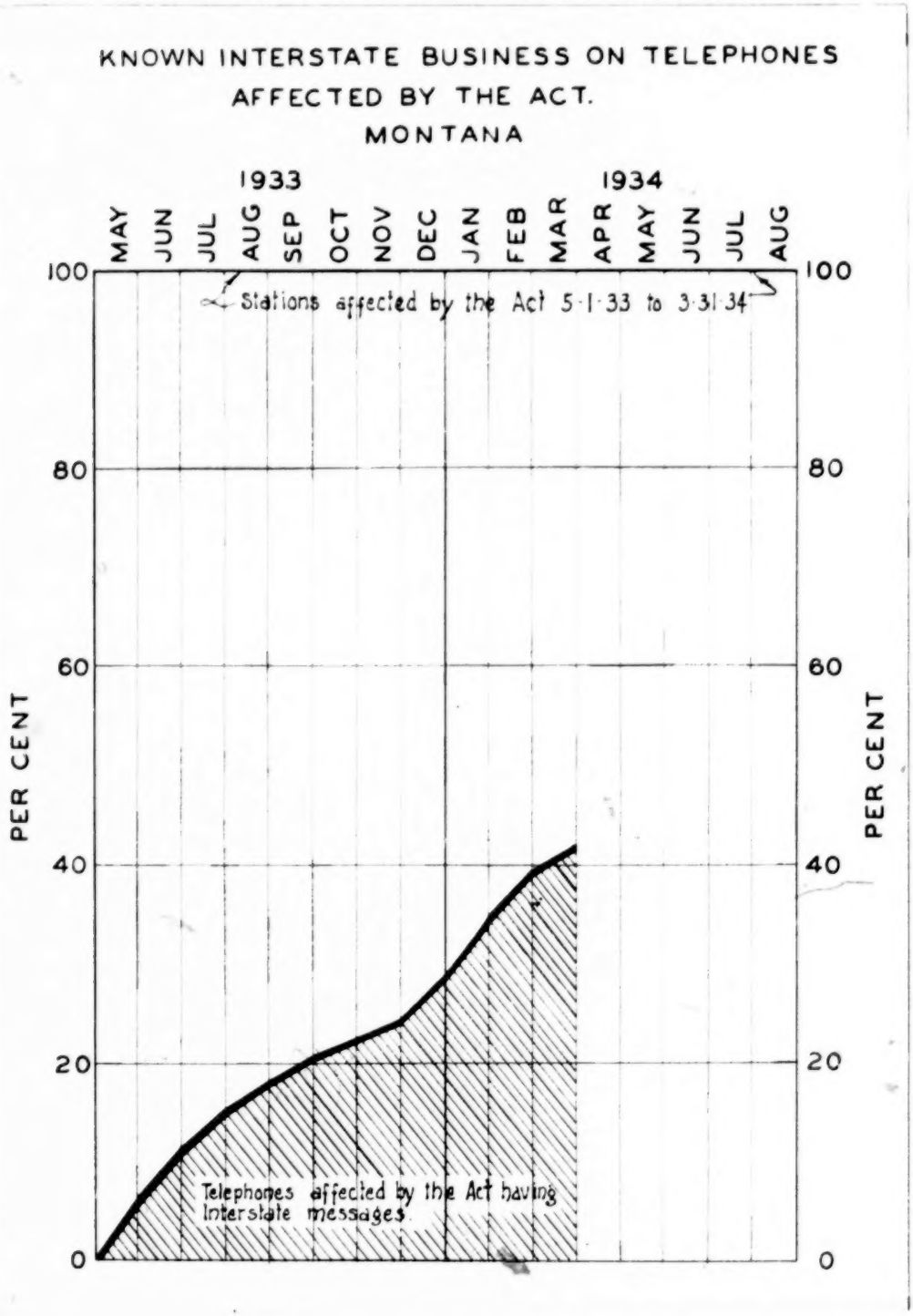
The plat, which has been marked for identification "Plaintiff's Exhibit No. 2," illustrates graphically the changes that I have stated would be involved. We started from the date which is designated there as May. It started, however, April 21st. We could not start right on the day of the Act. We could not get organized to pick up the data. This shows the month to month increase, on a percentage basis, of the number of telephone instruments in the State of Montana that are used for interstate commerce. That includes both telephone and telegraph. It shows that over 40 per cent have been used since the date of this study. The incline of the curve is substantially increased, as I have said. It is just a question of continuing the study every day until practically all telephones will have been used in interstate business. It has been growing quite rapidly. Communication could be made through our system here in Montana to over 92 per cent of the telephones in the world. There are over 32 million telephones in the world. We connect with 30 million.

"Mr. Gunn: We offer this map, and this chart in evidence, if Your Honor please.

"Judge Bourquin: Very well."

(Here follows chart, side folio 75a)

PLAINTIFF'S EX. 2. MARKED FOR IDENTIFICATION



Cross-examination:

I have not, nor has the company, kept any records of the number of times these telephones have been used in foreign business, compared to the— In this study we [fol. 77] took the initial usage and ignored any subsequent usage. Of course, I can give you some idea from other records. Say on a revenue basis from 25 to 30 per cent of the revenue each month will show up as interstate. Taking Lewis & Clark County, and the City of Helena, as an example, there are no records by a count of the number of times that telephones have been used in interstate or foreign or domestic calls. The revenue business, as I stated, could indicate somewhat. In the ordinary conduct of our office we make no distinction in billing a customer. We do not separate the originating revenue; we simply bill it. For the State, as I stated, interstate varies by months between 25 and 30 per cent of the originating toll revenue, excluding local telephone revenue. Those calls will run somewhat less.

I did not bring a copy of our tariff or schedule of rates for toll charges, which have been filed with the State of Montana. Our toll rates are built up on the block rate system. It is so all over the United States. Then we have filed in the local exchange for operator's use, specific rates between the most commonly used points. I did not bring any tariff. It can, of course, be easily obtained.

You could not say that it would not be a possibility that any particular telephone, say your telephone here in the City of Helena, may never be used for interstate commerce. As indicated here, over a period of time, for one reason or another, you get interstate usage. For example, the customer himself in Helena does not control the interstate usage, because his friend or relative, some one outside the State, may call him up tomorrow. Some one might call you when you go home tonight. Some one might call you [fol. 78] up from Salt Lake. You have the customer's will as to usage, and then the demand from the outside. I did not testify that ultimately all the telephones would be used for interstate or foreign business. I said practically all. And I said that as you approach 100 per cent there will be certain stations that will persist for a long time. As you say, it is not impossible. You might have one or two maybe

that are never used. If they stay there in service, you may have, although I do not know.

I would say from this study, which does not run quite a year, under the new Act, which will show a higher percentage, that over 50 per cent of the telephones will be used in a year in interstate telephone or telegraph service. This estimate is based on this study, which we put in evidence, where we counted the initial use of an instrument in interstate business during that period, and made no subsequent counts of interstate use on that telephone. It is an actual accrual of only the instruments that have been used in that period for interstate commerce.

Interrogation by Judge Bourquin:

"Q. Now you say, this time, 12,000 telephones."

"A. Under both acts, your Honor. Over 10,000 in one, and 2,108 in the other period. That makes over 12,000."

Those are separate telephones. There is no duplication of calls. There were that many telephones regardless of how many calls there were over them. Those are telephones which at one time at least were used in interstate commerce. No telephone in that number is counted twice.

Of the originating toll business, 25% used in Montana were in interstate calls. That does not include our city [fol. 79] business. Of the originating toll business, between from 25 to 30 per cent, on a revenue business, will be interstate. These tabulations are on a call basis regardless of the money.

The total receipts interstate and intrastate? That would be about— Just a minute. I can get that a little better than by guessing at it. (Obtaining papers from a brief case.) That would range from 4 to 8 per cent of our total, in the State of Montana. That includes all charges we make, and all assignable revenue to Montana. It would be about— It would range from 4 per cent up around 8.

Our system in the city itself, of course, is a combined unit. Now, a call comes in from one subscriber of the city to another subscriber. A call comes in, as a rule, to central from the originator of the call. That subscriber's line, through switching devices, is connected to the called subscriber's line, and she rings his bell. That act is entirely independent of any interstate, except as to facilities. If

the subscriber then calls some one in Idaho it comes in over the instrument line in the same way as the previous call did. Then, at the point at which the operator would have connected to a regular called subscriber, she connects instead to a toll trunk. In other words, she attaches his line to the toll line going to Idaho, and eventually we get the party.

The fact is that our instrument will be used by the telephone company for telegrams. We have arrangements for that. I consider that the telephone is being used for interstate business in that use, in this way: There are a number of places in Montana where there is no local office of either [fol. 80] the Western Union or the Postal. The messages are given to us, and we send them to the central office, or to the receiving office of the Western Union, and thy are then sent out. I think there is a clear distinction, one from the other as far as interstate commerce is concerned. The communication is delivered at the office with a view of having it sent— Yes, I know that is the same as delivering a message to the telegraph office or to the depot. But it is different with the depot. That receives the goods and sends them on. That is interstate commerce. So in the telephone office. We take the message and— I think there is a difference.

Redirect examination:

The interstate rate takes into consideration an ' contemplates the use of these local telephones in making a toll call. The toll charge is built up from point to point, or what we call from board to board, and it is not including anything for the exchange facility.

By the Court, Judge Bourquin:

"Q. If you did not use the telephone for an interstate call, yet you would pay as much for the local use?"

"A. Yes. We make no distinction in how much he uses local or how much he uses toll in the flat charge."

In that period, in the first period, there were over 10,000 telephones included in our interstate communications, of which over 2,000 were for telegrams.

[fol. 81] By the Court, Judge Bourquin:

"Q. Twelve thousand telephones used in the interstate there, and among them there were telephones used to telephone a message to the telegraph office?

"A. No, sir; they were used in interstate telegraph business.

"Q. They were used to telephone a telegram down to the telegraph office? You are including that in the interstate commerce?

"A. That is——

"Q. (After a pause by the witness.) Did you not just say so?

"A. Yes,—on the originating end.

"Q. Yes.

"A. I was just trying to get your question clear.

"Q. In other words, when you say you use 12,000 telephones at a time in interstate commerce, in that 12,000 you have included telephones by which John Smith or any one else sent a telegram to the telegraph office?

"A. Yes."

By Mr. Gunn:

"Q. Have you the number of telephones included in that?

"A. Yes, there were 2,000 of those in the first, and 369 in the second group."

Eliminating the charge for those used in telegraphing messages, over nine thousand would still remain actually used in interstate telephonic communication.

Recross-examination:

Between 25 and 30 per cent of the originating toll reve-[fol. 82] nues—that excludes telegrams—is interstate. The toll rates are established regardless of whether they are interstate or intrastate. They are established on a board to board basis. None of that revenue that I speak of as inerstate business, or foreign business, comes from the monthly rate charged to customers. That is separate. That is, the monthly rate is charged the customer for local service.

"Mr. Matson: That is all.

"Mr. Gunn: That is all, your Honor.

"Mr. Matson: The defendants rest."

* * * * * * *

Upon stipulation the case was submitted for final decision on the showing made on the application for an interlocutory injunction.

* * * * * * *

The above and foregoing is all of the evidence introduced at the trial of said cause, and contains all proceedings had in the trial thereof necessary for a review of the ruling assigned as error on this appeal.

Wherefore the defendants and appellants pray that the above statement of evidence be settled, approved and allowed by the above entitled Court as a true, full and complete statement of all the evidence taken and given on the trial of said cause, for use on the appeal taken to the Supreme Court of the United States.

Dated at Helena, Montana, this 14th day of July, 1934.

Raymond T. Nagle, Attorney General, State of Montana; Enor K. Matson, Assistant Attorney General, State of Montana, Solicitors for Defendants and Appellants.

[fols. 83 & 84] Service of the foregoing proposed Statement of Evidence admitted and receipt of a copy thereof acknowledged this 14th day of July, 1934.

Gunn, Rasch, Hall & Gunn, Milton Smith, Jr., J. R. Turnquist, Solicitors for Plaintiff and Appellee.

[File endorsement omitted.]

[fol. 85] In United States District Court

[Title omitted]

Stipulation as to Transcript of Record—Filed Aug. 3, 1934

It is hereby stipulated and agreed by and between Milton Smith, Jr., J. R. Turnquist, Denver, Colorado, and Gunn, Rasch, Hall and Gunn, Helena, Montana, Solicitors for Plaintiff and Appellee, and Raymond T. Nagle, Attorney

General, and Enor K. Matson, Assistant Attorney General, Solicitors for Defendants and Appellants, that the papers of record which shall constitute the transcript of record on appeal to the Supreme Court of the United States herein, shall consist of the following:

1. Bill of Complaint;
2. Joint Answer;
3. Written opinion by Judge Bourquin;
4. Written dissenting opinion by Judge Garrecht;
5. Findings of Fact, Conclusions of Law and Decree;
6. Petition for Appeal;
7. Assignment of Errors and Prayer for Relief;
8. Statement of Basis of Appellate Jurisdiction;
9. Order allowing Appeal;
10. Citation on Appeal;
11. Statement under Paragraph 3, Rule 12 and Service Thereof;

[fol. 86] 12. Statement of Evidence as allowed, approved and settled;

13. Stipulation re Approval Statement of Evidence;
14. Order approving Statement of Evidence;
15. Stipulation as to Transcript of Record;

and the Clerk of the above entitled Court is requested to forward to the Clerk of the Supreme Court of Washington, D. C., only the papers designated herein.

This stipulation is made and entered into pursuant to Rule 10 of the Supreme Court of the United States.

Dated this 25 day of July, 1934.

Milton Smith, Jr., J. R. Turnquist, Gunn, Rasch, Hall & Gunn, Solicitors for Plaintiff and Appellee. Raymond T. Nagle, Attorney General; Enor K. Matson, Assistant Attorney General, Solicitors for Defendants and Appellants.

[File endorsement omitted.]

[fol. 87] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 88] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Oct. 13, 1934

Come now the appellants in the above entitled cause and adopt their Assignment of Errors as their statement of the points to be relied upon, and state that the whole of the record, as filed, is necessary for the consideration of the case.

Dated at Helena, Montana, August 3rd, 1934.

Raymond T. Nagle, Attorney General; Eward K. Matson, Assistant Attorney General, Solicitors for Appellant.

Service of the above and foregoing statement is hereby [fols. 88 & 90] admitted and receipt of a copy thereof acknowledged this 3rd day of Aug., 1934.

Milton Smith, Jr., J. R. Turquist, Gunn, Rasch, Hall & Gunn, Solicitors for Appellee.

[fol. 91] [File endorsement omitted.]

Endorsed on cover: File No. 39,051. D. C. U. S., Montana. Term No. 423. Frank H. Cooney, as Governor of the State of Montana, et al., etc., Appellants, vs. The Mountain States Telephone and Telegraph Company. Filed September 27, 1934. File No. 423, O. T., 1934.

2

FILE COPY

Office Supreme Court, U. S.
FILED
SEP 27 1934
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 423

FRANK H. COONEY, AS GOVERNOR OF THE STATE OF MONTANA, ET AL., ETC.,

Appellants,

vs.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

STATEMENT AS TO JURISDICTION.

RAYMOND T. NAGLE,
ENOR K. MATSON,
Counsel for Appellants.

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TABLE OF CASES CITED.

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STATUTES CITED.

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Montana Session Laws of 1933, Chapter 174, page 379, as amended by Chapter 54, page 161, Session Laws of Montana of 1933-34	2, 3

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA

In Equity.

No. 1495

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, A CORPORATION,

Plaintiff,

vs.

FRANK H. COONEY, AS GOVERNOR OF THE STATE OF MONTANA; RAYMOND T. NAGLE, AS ATTORNEY GENERAL OF THE STATE OF MONTANA; AND JAMES J. BRETT, AS TREASURER OF THE STATE OF MONTANA,

Defendants.

STATEMENT OF BASIS OF APPELLATE JURISDICTION.

Pursuant to the provisions of Supreme Court Rule 12, Paragraph 1, the above named defendants and appellants file this, their statement, showing the basis on which said defendants and appellants contend that the Supreme Court of the United States has jurisdiction, upon appeal, to review the permanent injunction decree and order appealed from herein, as follows:

I.

The statutes believed to sustain the appellate jurisdiction are Sections 238 and 266 of the Judicial Code as amended (28 U. S. C. A. Section 345 (3) 380).

II.

The statutes of the State of Montana, the validity of which is involved, are Chapter 174 of the Montana Session Laws of 1933 as amended by Chapter 54 of the Special Session Laws of 1933.

The provisions of said Chapter 174, *supra*, that are pertinent to the appeal provide:

> "Every person, firm, copartnership, association, joint stock company, syndicate and corporation engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana, whether as owner, lessee, trustee or receiver or in any other capacity, shall pay in to the State Treasurer on or before the first day of January each year a license tax in the amounts following for each telephone instrument used, controlled and operated by it in the conduct of such business, based upon the number of telephone instruments owned, controlled and operated by it during all or any part of the calendar year, to-wit: On the first twenty (20) telephone instruments or less a license tax of Ten Cents (10¢) per phone; from twenty (20) to seventy-five (75) such instruments a license tax of Twenty Cents (20¢) per phone, and on all above seventy-five (75) a license tax of One Dollar ($1.00) for each such instrument. The license tax so paid shall in no manner effect the rates charged to the patrons and users of such telephone instruments, but shall be borne entirely by the owning and operating concern. Provided, the tax herein provided for shall not be imposed on any telephone instrument where the rate charged the customer therefor does not exceed Two Dollars ($2.00) per month for

residence phone, or Three Dollars ($3.00) per month for business house or office phone."

Chapter 174, page 379, Laws of Montana, 1933 (Twenty-third Session).

The provisions of said Chapter 54, *supra*, pertinent to the appeal, and which amend said Section 1 of said Chapter 174, provide:

"Every person, firm, co-partnership, association, joint stock company, syndicate and corporation engaged in the business of operating or mainaining telephone lines and furnishing telephone service in the State of Montana, whether as owner, lessee, trustee or receiver or in any other capacity, shall pay in to the State Treasurer on or before the first day of March each year a license tax in the amounts following for each telephone instrument used, controlled and operated by it in the conduct of such business.

"A license tax of Two Dollars ($2.00) for each instrument.

"No bill, statement or account rendered or given any customer by any telephone company shall set out or contain, as a separate item, any amount on account or by reason of the license tax imposed by this Act. Every person, firm, co-partnership, association, joint stock company, syndicate or any corporation affected by the provisions of this Act shall be permitted to claim as exempt from the tax imposed by this Act any telephone instrument where the rate charged the customer therefor does not exceed Two Dollars ($2.00) per month for residence phone, or Four Dollars ($4.00) per month for business house or office phone. Provided further, that the provisions of this Act shall not apply to mutual telephone companies or lines not organized or used or operated for private or corporate gain."

Chapter 54, page 161, Laws of Montana, 1933-34 (Twenty-third Extraordinary Session).

III.

The date of the decree and order sought to be reviewed herein is May 29, 1934, and the date upon which the application herein for appeal is presented is the 10th day of July, 1934.

IV.

The appeal herein is from a permanent injunction decree and order granted by a specially constituted District Court convened under the provisions of Section 266 of the Judicial Code, as amended (28 U. S. C. A. 380), restraining and enjoining the defendants, and each of them, and any and all persons acting in aid or assistance of them, or either of them, from taking any action against the plaintiff to enforce against the plaintiff the provisions of said Chapter 174 of the Session Laws of Montana 1933, or said Act as amended by Chapter 54 of the Session Laws of the Extraordinary Session of 1933-34, and from collecting or attempting to collect any tax or enforcing or attempting to enforce any penalty provided for therein.

V.

The cases believed to sustain the jurisdiction are as follows:

Stratton v. *St. Louis S. W. Ry. Co.*, 282 U. S. 10, 51 Sup. Ct. Rep. 8, 75 L. Ed. 135;

Ex parte Buder, 271 U. S. 461, 46 Sup. Ct. 557, 70 L. Ed. 1036.

Dated at Helena, this 10th day of July, 1934.

Respectfully submitted,

RAYMOND T. NAGLE,
Attorney General,
ENOR K. MATSON,
Assistant Attorney General,
Solicitors for Defendants and Appellants.

(5455-C)

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Supreme Court of the United States

OCTOBER TERM, 1934

FRANK H. COONEY, as Governor of the State of Montana; RAYMOND T. NAGLE, as Attorney General of the State of Montana; and JAMES J. BRETT, as Treasurer of the State of Montana,

Appellants,

vs.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a corporation,

Appellee.

BRIEF OF APPELLANTS

Appeal from the District Court of the United States, in and for the District of Montana.

STATEMENT OF THE CASE

This is an appeal from a permanent injunction decree (R. 26) granted by a specially constituted District Court of the United States, for the District of Montana, convened under the provisions of Section 266 of the Judicial Code, as amended (28 U. S. C. A. 380), restraining and enjoining the appellants from taking any action against the appellee to enforce against the appellee the provisions of Chapter 174 of the Session Laws of Montana, 1933, or said Act as amended by Chapter 54 of the Session Laws

of the Extraordinary Session of 1933-34 (see Appendix for Act and as amended), and from collecting or attempting to collect any tax or enforcing or attempting to enforce any penalty provided therein.

Section 1 of Chapter 174, Laws of Montana, 1933, provided for the collection from any person, firm, etc., engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana, of an annual license tax for each telephone instrument where the rate exceeds Two Dollars ($2.00) per month for residence phone, or Three Dollars ($3.00) per month for business house or office phone, at the following rate: On the first twenty (20) telephone instruments or less a license tax of Ten Cents (10c) per phone; from twenty (20) to seventy-five (75) such telephone instruments a license tax of Twenty Cents (20c) per phone, and on all above seventy-five (75) such telephone instruments a license tax of One Dollar ($1.00) for each instrument.

Section 1 of Chapter 54, Laws of Montana, 1933-34 amending said Chapter 174, provides for the collection from every person, firm, etc., engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana, of a license fee of $2.00 for each instrument where the rate charged the customer therefor exceeds Two Dollars ($2.00) for each instrument per month for residence phone or Four Dollars ($4.00) per month for business house or office phone.

The original Act (Chapter 174, supra) provides that "the license tax so paid shall in no manner effect the

rates charged to the patrons and users of such telephone instruments, but shall be borne entirely by the owning and operating concern." Section 1 of Chapter 54, supra, amending said Section 1, Chapter 174, does not contain such clause but provides that "no bill, statement or account rendered or given any customer by any telephone company shall set out or contain, as a separate item, any amount on account or by reason of the license tax imposed by this Act." It also provides that "the provisions of this Act shall not apply to mutual telephone companies or lines not organized or used or operated for private or corporate gain."

Appellee, a Colorado corporation, authorized to do business in Montana, operates a telephone business of an interstate and an intrastate character extending throughout the States of Montana, Idaho, Utah, Wyoming, Colorado, Arizona, New Mexico and a portion of Texas. Its system is one of the units of a telephone system extending throughout the United States and foreign countries. The appellee is subject to the jurisdiction of the Public Service Commission of the State of Montana, as to its intrastate business and to the jurisdiction of the Interstate Commerce Commission under the provisions of the Interstate Commerce Act.

All the telephone instruments affected by this Act, and as amended, are connected with this system so that they may be used for long distance calls. Some of them have been so used since the passage of this Act, and, eventually, practically all of them will be used in long distance calls, (R 41), that is, in interstate or foreign business. In addi-

tion to the telephone calls transmitted over its telephone instruments, the telephone company has also made arrangements with telephone and cable companies, whereby telephone and cable messages of an interstate, international, as well as intrastate character, are delivered.

The monthly rate of $2.00 per month for residence phones and $3.00 or $4.00 per month for business or office phones, entitles the subscriber or patron to use the telephone for local or intrastate calls only. (R 44). He may not use the telephone for long distance calls, either interstate or intrastate, unless he pays a toll, an extra charge for such use. The evidence discloses that of the total revenue for long distance calls, which, of course, included intrastate, as well as interstate and foreign business, 25 to 30 per cent is interstate. (R. 41, 42). None of this 25 to 30 per cent revenue is derived from the monthly charge to patrons which is paid for local use only. (R. 44). The interstate revenues of the company are from 4 to 8 per cent of the total revenues received by the telephone company in the State of Montana. (R. 42).

SPECIFICATION OF ERRORS

Appellants specify the following errors, which they intend to urge:

I

The Court erred in finding that any and all of the telephones which the appellee maintains in the State of Montana, may be used in interstate or foreign commerce for the reason that the evidence presented is insufficient to support such finding.

II

The Court erred in finding that all of the telephones constituting a part of the appellee's telephone system in Montana, are instrumentalities of interstate and foreign commerce for the reason that the evidence presented is insufficient to support such finding.

III

The Court erred in holding and finding that appellee could not discontinue its intrastate business and operations in Montana without virtually destroying and being compelled to abandon and withdraw from its interstate and foreign business for the reason that the evidence presented is insufficient to support such holding and finding.

IV

The Court erred in holding that Chapter 174 of the Session Laws of Montana 1933, as originally enacted, and as amended by Chapter 54 of the Session Laws of the Extraordinary Session 1933-34, is in violation of Article I, Section 8, Clause 3 of the Constitution of the United States, in that it imposes a burden upon and constitutes a regulation of interstate and foreign commerce, the evidence being insufficient to support such holding or finding; and it appearing that said act, and as amended, levies a tax solely upon or on account of the intrastate business of the plaintiff, and it imposes no tax restriction or burden upon or on account of the interstate or foreign business of the appellee.

V

The Court erred in rendering a decree for the appellee herein permanently enjoining and restraining the appel-

lants, and each of them, and any and all persons acting in aid or assistance of them, or either of them, from taking any action against the appellee to enforce against the appellee the provisions of Chapter 174 of the Session Laws of Montana of 1933, and as amended by Chapter 54 of the Session Laws of the Extraordinary Session of 1933-34, and from collecting or attempting to collect any tax, or enforcing or attempting to enforce any penalty provided for therein, on the ground that said act, and as amended, is in violation of Article I, Section 8, Clause 3, of the Constitution of the United States, in that it imposes a burden upon, and constitutes a regulation of interstate and foreign commerce as said Act, and as amended, levies a tax solely upon the intrastate business of the said plaintiff, and it imposes no tax restriction or burden upon or on account of the interstate or foreign business or commerce of the plaintiff.

VI

The Court erred in failing to dismiss the bill of complaint inasmuch as said Act, and as amended, is valid as it merely levies or attempts to levy a tax solely upon, or on account of the intrastate business of the appellee and it imposes no tax restriction or burden upon the interstate or foreign business or commerce of the appellee.

SUMMARY OF ARGUMENT

I

The Act, and as amended, does not interfere with or impose a burden upon interstate commerce, but is merely a tax upon intrastate commerce.

Ogden v. Crossman, 14 Utah 66, 53 Pac. 985;

State v. Rocky Mountain Bell Tel. Co., 27 Mont. 394, 71 Pac. 311;
State v. Northern Pacific Express Company, 27 Mont. 419, 71 Pac. 404;
Ratterman v. Western Union Tel. Co., 127 U. S. 411;
The State Freight Tax, 15 Wall. 232;
Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192;
Postal Tel.-Cable Co. v. Charleston, 153 U. S. 692;
Pacific Express Co. v. Seibert, 142 U. S. 339;
Osborne v. Florida, 164 U. S. 650;
Pullman Co. v. Adams, 189 U. S. 420;
Allen v. Pullman Co., 191 U. S. 171;
Kehrer v. Stewart, 197 U. S. 60;
Crutcher v. Kentucky, 141 U. S. 47;
Ohio River & W. R. Co. v. Ditty, 232 U. S. 576;
St. Louis Southwestern Railway Company v. Arkansas ex rel. Norwood, 235 U. S. 350;
People ex rel. Cornell Steamboat Company v. Sohmer, 235 U. S. 549;
Postal Telegraph-Cable Co. v. City of Fremont, 255 U. S. 124;
Postal Telegraph-Cable Co. v. City of Richmond, 249 U. S. 252;
Raley & Bros. v. Richardson, 264 U. S. 157;
Sprout v. South Bend, 277 U. S. 163;
East Ohio Gas Company v. Tax Com. 283 U. S. 465;

A. The statute is a tax upon the telephone instruments in form only; in substance it is a tax upon intrastate business measured by the number of telephones in intrastate use. The court will look through the form to the substance of things.

Western Union Tel. Co. v. Kansas, 216 U. S. 1;
Cudahy v. Hinkle, 278 U. S. 460, 470;
Postal Telegraph-Cable Co. v. Adams, 155 U. S. 688, 698;
Adams Express Co., v. New York, supra;

State v. Rocky Mountain Bell Tel. Co., 27 Mont. 394, 71 Pac. 311;
Ogden City v. Crossman, 17 Utah 66, 53 Pac. 985;
Sonneborn Bros. v. Curcton, 262 U. S. 506, 519;
Hump Hairpin Co. v. Emmerson, 258 U. S. 290, 295;

B. Although a license tax upon intrastate commerce may have an indirect and incidental effect upon interstate commerce, it is not for that reason unconstitutional. The same principal applies as in ad valorem taxes and taxes for police regulation. A practical interpretation should be given to the act.

Virginia v. Imperial Coal Sales Company, Incorporated, ...U. S.....;
Robbins v. Shelby County Taxing District, 120 U. S. 489, 492; (and other cases listed);
Allen v. Pullman Co., 191 U. S. 171, 181;
Western Union Tel. Co. v. Kansas, 216 U. S. 1, 44;
Osborne v. Florida, supra;
Hump Hairpin Co. v. Emmerson, supra;
Boston & Main R. Co. v. Armbury, 285 U. S. 234, 238;
Edelman v. Boeing Air Transp., 289 U. S. 249;
Helson v. Kentucky, 279 U. S. 245;
Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249;
Eastern Air Transport v. Tax Comm., 285 U. S. 147;
New Jersey Telephone Co. v. Tax Board, 280 U. S. 338, 346.

C. The Telephone Company may discontinue its intrastate business without also withdrawing from interstate commerce. The permissive charter of the company obtained by virtue of the Montana Constitution does not require the company to operate at a lose. That withdrawal from intrastate commerce may be impracticable

or inconvenient will not make the license tax unconstitutional.

Railroad Company v. Eastern Texas R. R. 264 U. S. 79;
Pullman v. Adams, 189 U. S. 420;
Western Union Tel. Co. v. Kansas, 216 U. S. 1, 41.

D. The statute does not prevent the charging of the tax to operating cost. If a clause in the original act so provided, that clause may be void without rendering the whole act unconstitutional. Since no application has been made to the Public Service Commission for increase of rates, appellee cannot complain.

59 C. J. 639;
Postal Telegraph-Cable Co. v. City of Fremont, 255 U. S. 124, 41 Sup. Ct. Rep. 279.

E. A similar statute has been construed by the Montana Supreme Court as applying to and affecting intrastate business only, and as not affecting interstate commerce. Federal courts will follow the construction given by a state court to its own statute.

Ogden City v. Crossman, 17 Utah 66, 53 Pac. 985;
State v. Rocky Mountain Bell Tel. Co. 27 Mont. 394, 71 Pac. 311;
State v. Northern Pacific Express Co., 27 Mont. 419, 425, 71 Pac. 404;
Osborne v. State of Florida, supra;
Ohio River & W. R. Co. v. Dittey, 232 U. S. 576 (supra);
St. Louis Southwestern Railway Co. v. Arkansas, 235 U. S. 350 (supra);
Campbell v. City of Olney, 262 U. S. 354;
In re Floyd and Hayes, 225 Fed. 262, 265.

F. There is not sufficient evidence upon which the court could find that all of the telephone instruments

which appellee maintains in Montana, are instrumentalities of interstate or foreign commerce. Evidence of potential or occasional use of telephone instruments for that purpose does not justify finding that such instruments are instrumentalities of interstate or foreign commerce when in fact they are actually used exclusively or almost exclusively for intrastate commerce. Nor was the finding that appellee could not discontinue its intrastate business and operations in Montana, without virtually destroying and being compelled to abandon and withdraw from its interstate and foreign business, warranted by the evidence.

II

The statute does not impair the obligation of a contract. No contract exists by which the state is prevented from collecting a tax otherwise valid.

Section 7, Article XII, of the Montana Constitution.

III

The statute does not deny to appellee the equal protection of the law. The penalty for violation of the statute is not too severe.

Tax Commissioners v. Jackson, 283 U. S. 527;
American Sugar Rfg. Co. v. Louisiana, 179 U. S. 89;
Quong Wing v. Kirkendall, 223 U. S. 59;
Metropolis Theater Co. v. Chicago, 228 U. S. 61;
Cargill v. Minnesota, 180 U. S. 452;
Armour Packing Co. v. Lacy, 200 U. S. 226;
Bradley v. Richmond, 227 U. S. 477;
Singer Sewing Machine Co. v. Brickell, 233 U. S. 304;
Rast v. Van Deman & Lewis Co., 240 U. S. 342;

Armour & Co. v. Virginia, 246 U. S. 1;
Bronson v. Brush, 251 U. S. 182;
Alward v. Johnson, 282 U. S. 509;
Consolidated Coal Co. v. Illinois, 185 U. S. 203;
Citizens Tel. Co. v. Fuller, 229 U. S. 322;
O'Connell v. State Board of Equalization, 95 Mont. 91, 25 Pac. (2d) 114-199;
12 C. J. p. 1177, Section 927;
Rail, etc., Coal Co. v. Yaple, 236 U. S. 338, 35 Sup. Ct. 359, 59 L. Ed. 607;
Portland R., etc., Co. v. Portland, 210 Fed. 667;
Oregon R., etc., Nav. Co. v. Campbell, 173 Fed. 957;
Chicago, etc., R. Co. v. Davis, 114 Ark. 519, 170 S. W. 245;
State v. Oregon, etc., Co., 68 Wash. 160, 123 Pac. 3;
Rail etc., Coal Co. v. Ohio Industrial Commission, supra.

IV

The act does not deprive the Telephone Company of its property without due process of law. Appellee may deduct the tax as an operating expense, any clause in the original act to the contrary notwithstanding. There has been no application to the Public Service Commission for relief. There is no proof that the tax is confiscatory.

V

The act does not violate the Montana Constitution on the ground that it directs the State Treasurer to pay out of the state treasury without specific appropriation, or because the amount credited to the relief fund is not specified. The Constitution does not require that an appropriation be specific in dollars and cents. The amount of the tax can be determined by a simple mathematical calculation.

59 *C. J. p.* 250;
State v. State Board of Examiners, 74 Mont. 1, 238 Pac. 315;
People v. Miner, 46 Ill. 384.

VI

The act does not delegate legislative power to the Governor and does not for this reason violate the Montana Constitution. The Governor merely determines a fact and this the legislature may authorize him to do.

Field v. Clark, 143 U. S. 649, 694;
Union Bridge Co. v. U. S., 204 U. S. 364, 377;
U. S. v. Grimaud, 220 U. S. 506;
Hampton & Co. v. U. S., 276 U. S. 394, 405;
Buttfield v. Stranahan, 192 U. S. 470;
In re Kollock, 165 U. S. 526;
Oceanic Navigation Co. v. Stranahan, 214 U. S. 320;
Interstate Commerce Commission v. Goodrich, Transit Co., 224 U. S. 194, 214;
State v. Chicago etc., Ry. Co., 38 Minn. 281, 298, 302; 134 U. S. 418, 459, 461, 464;
State v. Board of Examiners, 74 Mont. 1, 238 Pac. 316;
State v. Johnson, 75 Mont. 240, 243 Pac. 1073;
Chicago etc., Ry. Co. v. Board of Railroad Commissmissioners, 76 Mont. 305, 247 Pac. 162;
State v. Asal, 79 Mont. 385, 256 Pac. 1071;
Northern Pacific Ry. Co. v. Bennett, 83 Mont. 483, 272 Pac. 987;
12 *C. J.* 846, *note* 76.

VII

The claim of the company that the operation of its telephone system in Montana, is a duty it cannot abandon and not a privilege, and, therefore, it cannot be taxed, is untenable. The duty to serve the public as long as it occupies the field, makes the operation of a telephone in

Montana nevertheless a privilege. The company may discontinue its business when it cannot operate at a profit.

City of Helena v. Helena Light & Ry. Co., 63 Mont. 108, 207 Pac. 337;
State v. Helena P. & L. Co., 22 Mont. 391.

VIII

The statute is not a special law for the assessment or collection of taxes; it is general in scope and operates upon all alike within a given class.

Hart Refineries v. Harmon, 81 Mont. 423, 263 Pac. 687;
State ex rel. Federal Land Bank v. Hayes, 86 Mont. 58, 282 Pac. 32;
State ex rel. Redmen v. Meyers, 65 Mont. 124, 210 Pac. 1064;
Trumper et al. v. School District, 55 Mont. 90, 173 Pac. 946;
59 *C. J.* 729 *and cases cited in notes* 41 *and* 64;
59 *C. J.* 732, *Section* 319, *note* 80.

IX

The state is not without power to furnish relief in case of a great and general emergency even though the Montana Constitution lays a duty upon the counties to furnish relief. The grant of power to the counties does not limit the power of the legislature, and, if it did, the state having the right of self-preservation, may act under its police power. Regardless of relief, the legislature would have enacted the law for revenue anyway.

State v. State Board of Equalization, 56 Mont. 413, 185 Pac. 708;
Missouri River Power Co. v. Steele, 32 Mont. 433, 80 Pac. 1093;
Hilger v. Moore, 56 Mont. 146, 182 Pac. 477;
In re Pomeroy, 51 Mont. 119, 151 Pac. 333;

O'Connell v. State Board of Equalization, 95 Mont. 1, 25 Pac. (2d) 114;
State ex rel. Evans v. Stewart, 53 Mont. 18, 161 Pac. 309;
Great Northern Utility Co. v. Public Service Commission, 88 Mont. 180, 293 Pac. 294.
State v. Russell, 84 Mont., 61, 246 Pac. 148;
McNair v. School District, 87 Mont. 423, 288 Pac. 188;
City etc., v. Collins, 216 Cal. 187, 13 Pac. (2d) 912;
State ex rel. Hamilton v. Martin, 173 Wash. 249, 23 Pac. (2d) 1;
Lonabaugh v. Lonabaugh, 46 Wyo. 23, 22 Pac. (2d) 199;
State v. Industrial Commission, 207 Wis. 652, 242 N. W. 321;
Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917 E 938, Ann. Cas. 1918 A 1024;
Black v. Hirsh, 256 U. S. 135, 41 Sup. Ct. 458, 460, 65 L. Ed. 865, 16 L. R. A. 165;
Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 41 Sup. Ct. 465, 65 L. Ed. 877;
Levy Leasing Co. v. Siegel, 258 S. W. 242, 42 Sup. Ct. 289, 66 L. Ed. 595;
Chastleton Corporation v. Sinclair, 264 U. S. 543 44 Sup. Ct. 405, 406, 68 L. Ed. 841;
Home Loan Building & Loan Association v. Blaisdell, 290 U. S. 398;
Walker v. Bedford, 93 Colo. 400, 26 Pac. (2d) 1051, (dissenting opinions);
Hamilton v. Martin, 173 Wash. 249, 23 Pac. (2d) 1;
Commonwealth v. Liveright, 308 Pa. 35, 161 Atl. 697;
Jennings v. City of St. Louis, 332 Mo. 173, 58 S. W. (2d) 979, 87 A. L. R. 365;
Dill v. People, 94 Colo. 230, 29 Pac. (2d) 1035;
State v. Silver Bow Refining Co., 78 Mont. 1, 252 Pac. 301;
59 *C. J.* 855.

X

The Montana Constitution authorizes the imposition of a license for revenue.

Article XII, Section 1, *of the Montana Constitution*;
State v. Camp Sing, 18 Mont. 128, 56 Am. St. Rep. 551, 32 L. R. A. 635, 44 Pac. 516;
Northwestern Mutual Life Ins. Co. v. Lewis and Clark County, 28 Mont. 484, 98 Am. St. Rep. 572, 72 Pac. 982;
State v. Hammond Packing Co., 45 Mont. 343, 123 Pac. 407; Id., 233 U. S. 331, 58 L. Ed. 985, 34 Sup. Ct. Rep. 596;
Equitable Life Assur. Co. v. Hart, 55 Mont. 76, 183 Pac. 1062.

XI

There is no proof in the record that the tax is arbitrary, unreasonable or oppressive.

XII

A statute should be construed, if possible, so as to make it constitutional. Federal courts will follow a state court in the construction of its own statute.

New York Central R. R. v. United States, 212 U. S. 481;
State ex rel. Bonner v. Dixon, 59 Mont. 58, 195 Pac. 841;
12 *C. J.* 698, *Section* 37.

ARGUMENT

In considering whether the court erred in its holding and decree enjoining the collection of the tax instead of dismissing the Bill of Complaint several questions are presented by issues made by the pleadings. Since the court based its holding and decree solely upon the question of violation of the commerce clause of the Constitution,

(Specification of errors 3, 4, 5 and 6), we shall consider that question first, under Argument I, A-E. Specification of errors I-III will be considered under I, F of Argument.

I

THE ACT, AND AS AMENDED, DOES NOT INTERFERE WITH OR IMPOSE A BURDEN UPON INTERSTATE COMMERCE, BUT IS MERELY A TAX UPON INTRASTATE COMMERCE.

From the Act itself it appears that it was the intention of the Montana Legislature to levy a license tax upon only the intrastate or domestic business of the company. The amount of the intrastate business and the amount of the tax is measured by the number of telephones for which a certain monthly rate is paid. Such monthly charge is for local service, that is, intrastate business entirely. By the express terms of the statute, therefore, the license tax is limited to intrastate business. No tax is levied upon the extra tolls for interstate or foreign business or even upon the extra tolls for intrastate business generally termed "long distance calls." The Act does not admit of any other construction.

We have been able to discover but one case in the United States which concerned a like statute. The Act in question is almost identical with the one considered by the Supreme Court of Utah in Ogden v. Crossman, 14 Utah 66, 53 Pac. 985. An ordinance of the City of Ogden, among other things, provided:

> "Every person or corporation who shall operate and maintain in Ogden City, any telephone instrument for which a rental charge is made, shall pay an annual license fee of $5.00 for each instrument so used."

It was claimed by the *Rocky Mountain Bell Tel. Co.*, the defendant in that case, that the ordinance was unconstitutional in that it was an interference with interstate commerce. The facts and substance of the court's opinion, are set out in the following quotation:

> "It appears from the agreed statement of facts that the said corporation operated and maintained said instrument in the store of Mr. Ash, for which he paid the company five dollars per month; that this payment gave Ash the privilege of talking with persons in different parts of the city, and for no other place; that, if Mr. Ash used the instrument in talking with parties out of the state, he paid the usual stipulated sum charged therefor, outside of the rental price paid for the instrument. It is evident the defendant corporation operated and maintained such instrument in Ogden City for a stipulated monthly rental, for business of a local character, which was confined strictly within the city lmits. For interstate business it made another and distinct charge, independent of the local rental business charge of five dollars per month. Lessors of such instruments had no right to use them outside of the city, unless they paid certain extra charges therefor, to which all others were subject. *It is evident that the ordinance was not intended to, and does not, apply to or affect in any manner the business of the defendant corporation which is interstate in its character, and that such ordinance was intended to, and does, apply to and effect only the local business of said defendant company done within Ogden City, as shown from the rental of the instrument for use in Ogden City alone. By engaging in a business of operating and maintaining such telephones in Ogden City, and making and receiving a rental charge for the use of the instruments therein, and for no other place, it became amenable to the ordinance. A business done wholly within a city is within the taxing power of the city. The defendant corporation is not exempt from the operation of the*

> *ordinance, and the payment of a license upon its instruments or business which arises and is conducted wholly within Ogden City, even though at the same time the defendant corporation may do a business or use its instruments in Ogden City for business which is in part interstate in its character. We are of the opinion that the ordinance does not affect or apply to this latter class of business, which is interstate in its character.* (Italics supplied). *Osborne v. State of Florida,* 164 U. S 650, 17 Sup. Ct. 214; *Postal Tel. Cable Co. v. City of Charleston,* 153 U. S. 692, 14 Sup. Ct. 1094; *City of Anniston v. Southern R. Co.* (Ala.) 20 South. 915; *Harrow Co. v. Shaffer,* 68 Fed. 750."

A similar question came before the Montana Supreme Court in *State v. Rocky Mountain Bell Tel. Co.,* 27 Mont. 394, 71 Pac. 311, which had before it section 4071 of the Political Code of 1895 as amended by the Laws of 1897, page 202, which provided:

> "Every person, corporation or association *doing business in this State* as a telephone company must pay a license in each county where such business is transacted, of 75c per year for each instrument in use." (Italics supplied).

Among other cases, the court cited the *Ogden City Case,* supra, and quoted with approval the portion of the opinion which we have italicized above against the claim that the commerce clause of the Constitution was violated. It is true that in this case the court held that there was no proof that any of the telephones in question were used exclusively in interstate commerce and that the burden of such proof was upon the Telephone Company. We understand, however, that the court was in accord with the reasoning of the Utah Court in the *Ogden City Case,*

supra. In addition to that case the court cited and quoted from *State ex rel. Beek v. Wagener,* 77 Minn. 483, 80 N. W. 633, 778, 46 L. R. A. 442, 77 Am. St. Rep. 681; *Osborne v. State,* 33 Fla. 162, 14 South. 588, 25 L. R. A. 120, 39 Am. St. Rep. 99; 164 U. S. 650, 17 Sup. Ct. 214, 41 L. Ed. 586; *Commonwealth v. Gagne,* 153 Mass. 205, 26 N. E. 449, 10 L. R. A. 443; *Moore v. City of Eufaula,* 97 Ala. 673, 11 South. 921; *People v. Roberts,* 55 N. Y. S. 950. After comparing the authorities, the court said:

> "While there appears to be some conflict in the authorities, we are satisfied that the best considered cases fully sustain the views herein expressed.
>
> "Our conclusion therefore is that the evident intention of the legislature in passing Section 4071, above, was to impose the license tax of 75 cents on each telephone instrument used in purely local or intrastate business, and that as to instruments used in interstate business it was intended to have no application whatever."

Later, in *State v. Northern Pacific Express Company,* 27 Mont. 419, 71 Pac. 404, the court, in construing the language of Section 4074 of the Political Code 1895:

> "Every * * * corporation who engages as a common carrier in * * * conveying * * * express matter * * * from one place to another for hire * * * must procure a license * * *."

held that it was an attempt to impose a license upon the entire business of the company, a portion of which was interstate in character and it was therefore an interference with interstate commerce and void. The court said:

> "The statute *does not, by its terms,* attempt to make any discrimination between the local and inter-

> state business of the defendant company, and no such discrimination can be made under any fair construction of the language employed." (Italics supplied).

The court again speaking by Mr. Justice Holloway, in referring to the case of *State v. Rocky Mt. Bell Tel. Co.*, supra, said:

> "This court, in construing Section 4071 of the Political Code, which imposes a license tax upon every telephone company doing business *in this state,* held that by express terms the statute discriminated between local and interstate commerce, and that the manifest intention of the legislature that only local business should be subject to such license was clearly expressed."

We call attention to these cases by way of local background, as well as to show the construction which has been given by the Montana Supreme Court to a similar act at an earlier date. As a preface to a brief review of some of the cases decided by the Supreme Court of the United States, we may say that so far as it has come to our attention, this court has never, even in a minority opinion, questioned the right of the states to impose an excise tax on purely intrastate business of a public service corporation doing both an intrastate and an interstate business.

On the other hand, the principle that a state may, by appropriate legislation, levy a tax upon a corporation engaged in both intrastate and interstate commerce, if it is imposed solely on account of the intrastate business and is not increased because of the interstate business done, and no restriction is placed upon interstate business by

way of penalty, has been so frequently stated by this court that it is firmly established.

In one of the earlier cases, *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411, decided in 1887, this court held that a single tax of 5 per cent of the gross receipts assessed under the laws of Ohio upon receipts of a telegraph company which were partly derived from interstate commerce and partly from commerce within the state, and which were capable of separation but were returned and assessed in gross and without separation or appointment, was invalid in proportion to the extent that such receipts were derived from interstate commerce, but was otherwise valid; and that while the U. S. Circuit Court should enjoin the collection of the tax upon the portion of the receipts derived from interstate commerce, it should not interfere with those derived from commerce entirely within the state. The court arrived at this conclusion after an exhaustive review of its earlier decisions. In referring to the case of *The State Freight Tax*, 15 Wall. 232, it was said, page 424:

> "This ruling shows that where the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the court wll act upon this distinction, and will restrain the tax on interstate commerce while permitting the state to collect that arising upon commerce solely within its territory."

In *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, it was held that a state gross receipts tax of 8-10ths of 1 per cent against a domestic railroad corporation on ac-

count of transportation between points in the same state, but passing, during transportation, without the state, was not a tax upon interstate commerce, and did not infringe the provisions of the federal constitution. The court said:

> "Taxation is undoubtedly one of the forms of regulation, but the power of each state to tax its own internal commerce, and the franchise, property or business of its own corporations engaged in such commerce, has always been recognized, and the particular mode of taxation in this instance is conceded to be in itself not open to objection. And while interstate commerce cannot be regulated by a state by the laying of taxes thereon, in any form, yet when the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the distinction will be acted upon by the courts, and the state permitted to collect that arising upon commerce solely within its own territory. *Ratterman v. West. Union Tel. Co.*, 127 U. S. 411, 424."

In *Postal Tel.-Cable Co. v. Charleston*, 153 U. S. 962, it was held that a city ordinance, made under power conferred by a state statute, imposing a license tax of $500 upon a telegraph company upon business done exclusively within the city and not including any business done for the government of the United States, its officers or agents, was a valid exercise of the police power and was not an interference with interstate commerce. After reviewing the cases, the court said:

> "The express terms of the ordinance restrict the tax to 'business done exclusively within the city of Charleston, and not including any business done to or from points without the state, and not including any business done for the government of the United States, its officers or agents.'

"It is claimed that the Postal Telegraph Cable Company is not within the terms of this ordinance, because it does not do any business exclusively within the city of Charleston; that its city offices are merely initial points for sending and receiving messages, and that, irrespective of the messages sent or received outside of the state, the interstate messages are not between points within the city; and that, if license exactions were allowed to and made by the various cities in the state, great injury and wrong would be done to the telegraph company.

"But this is a hardship, if such exists, that it is not within our province to redress. If business done wholly within a state is within the taxing power of the state, the courts of the United States cannot review or correct the action of the state in the exercise of that power."

In *Pacific Express Co. v. Seibert,* 142 U. S. 339, the court had under consideration a statute of Missouri, imposing a privilege tax of 2 per cent of the company's gross receipts from business done within the state in addition to the ad valorem tax paid on the company's tangible property, and providing for a penalty of $100 a day for delinquency in making its report and paying the tax, and prohibiting the company from carrying on intrastate business in the state while such tax was delinquent, was upheld as a valid exercise of the state's taxing power and not violative of the commerce clause of the federal constitution. The court said:

"We therefore concur in the view of the court below that it was not the legislative intention, in the enactment of this statute, to impinge upon interstate commerce, or to interfere with it in any way whatever; and that the statute, when fairly construed, does not in any manner interfere with interstate commerce."

Osborne v. Florida, 164 U. S. 650, involved the validity of an occupation or license tax imposed by cities upon those pursuing diverse occupations and professions in so far as it affected express companies who were required to pay a tax of from $10 to $200 a year depending on the size of the city. As to express companies the state court had construed the act as applying only to intrastate and not to interstate business. As so construed, the supreme court held the act not violative of the federal constitution. In so holding, the court said:

> "It has never been held, however, that when the business of the company which is wholly within the state, is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the state of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the state statute. * * * *The statute herein differs from the cases where statutes upon this subject have been held void, because in those cases the statutes prohibited the doing of any business in the state whatever unless upon the payment of the fee or tax.* It was said as to those cases that as the law made the payment of the fee or the obtaining of the license a condition to the right to do any business whatever, whether interstate or purely local, it was on that account a regulation of interstate commerce, and therefore void. Here, however, under the construction as given by the state court, the company suffers no harm from the provisions of the statute. *It can conduct its interstate business without paying the slightest heed to the act,* because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the state.

> *"The company in this case need take out no license and pay no tax for doing interstate business, and the statute is therefore valid."* (P. 655—Italics supplied).

In this connection we desire to call attention to the language of the court in *Osborne v. State,* 33 Florida 102, (Affirmed in 164 U. S. 650) to the effect that a person or corporation in local business cannot be relieved from the provisions of the statute by an engagement at the same time in interstate commerce and that there is not a violation of the commerce clause if the person or corporation is free to carry on interstate commerce unaffected by the provisions of the act.

In *Pullman Co. v. Adams,* 189 U. S. 420, the court had before it a Mississippi statute, by which a tax was imposed on each sleeping and palace car company carrying passengers from one point to another within the state, $100, and 25c per mile for each mile of railroad track in the state over which the company ran its cars. Following its former decision in *Osborne v. Florida,* supra, and holding the tax valid, the court said, in part:

> "On the other hand, if the Pullman Company whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another with the state, the case is governed by *Osborne v. Florida,* 164 U. S. 650. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax."

Again, in *Allen v. Pullman Co.,* 191 U. S. 171, it was held that a tax law of Tennessee, requiring that sleeping

car companies pay a tax of $3,000 per annum in lieu of all other except ad valorem taxes for one or more passengers taken up at one point within the state and delivered at another and transported wholly within the state and which did not refer to or affect the interstate business of the companies, would not be regarded as a disguised attempt to tax the privilege of engaging in interstate commerce, where under the laws of the taxing state, it was not compulsory for a corporation engaged in interstate commerce to carry on that part of its business which was wholly within the state, and was therefore not repugnant to the commerce clause of the federal constitution. In so holding, the court followed its former ruling in *Osborne v. Florida, supra,* and *Pullman Co. v. Adams,* supra.

In *Kehrer v. Stewart,* 197 U. S. 60, the Supreme Court considered a state law of Georgia which provided that there should be assessed and collected "upon all agents of packing houses doing business in this state, two hundred dollars in each county where said business is carried on." It was claimed that this tax was a violation of the interstate commerce clause; that it denied petitioner due process of law and the equal protection of the law. In upholding the law, the court said: (P. 69).

> "* * * but if the agent carried on a definite, though a minor, part of his business in the state by the sales of meat there, he would not escape the payment of the tax, since the greater or less magnitude of the business cuts no figure in the imposition of the tax. There could be no doubt whatever that, if the agent carried on his interstate and domestic business in two distinct establishments, one would be subject and the

> other would not be subject to the tax, and in our view it makes no difference that the two branches of business are carried on in the same establishment."

This principle was recognized in *Crutcher v. Kentucky*, 141 U. S. 47, where the court said:

> "But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the state, would be open to no such objection."

This language was quoted by the court in *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 22.

In *Ohio River & W. R. Co. v. Dittey*, 232 U. S. 576—the "Ohio Tax Cases," the court had under consideration the Ohio statute to the effect that each railroad doing business in the state was required to report annually to the tax commission its entire gross earning for the preceding year for business done within the state, excluding therefrom all earnings derived wholly from interstate business or business done for the federal government. From such statement and other sources, the tax commission was required to find such gross earnings and certify the same to the Auditor of State, whereupon such auditor was required to charge for collection from each railroad company "a sum in the nature of an excise tax for the privilege of carrying on its intrastate business * * * by taking 4 per cent of all such gross earnings." The court, in affirming the action of the trial court in refusing to grant injunctions, said (P. 591):

> "In the third place it is insisted that the act, as applied to railroads, is a burden upon their foreign commerce.
>
> "* * * Certainly in the absence of a construction

> by the state court of last resort to the effect that the receipts from foreign commerce are to be included, and without any attempt on the part of the taxing authorities to include them, the federal courts ought not to place a construction upon the act that would render it unconstitutional."

In *St. Louis Southwestern Railway Company v. Arkansas ex rel. Norwood,* 235 U. S. 350, it was held that the annual franchise tax imposed by the Arkansas statute upon a railroad corporation "for the privilege of exercising its franchise in this state" of a specified percentage of the corporations outstanding capital stock represented by property owned and used in business transacted in the state, was not repugnant to the commerce clause of the federal constitution, as applied to a foreign railway company doing both interstate and intrastate business, where, *as construed by the state court,* such tax was upon the right to exercise the privilege to transact intrastate business in corporate form, the amount of the tax being fixed solely by reference to the property of the corporation that was within the state and used in business transacted within the state, excluding any imposition upon or interference with interstate commerce. The statute provided that a foreign corporation failing to pay the tax, would forfeit its right to do business in the state. The validity of the tax was attacked by a foreign railway corporation doing both interstate and intrastate business on the ground, among others, that by such forfeiture its interstate business would be unlawfully interfered with in violation of the commerce clause of the constitution. In upholding the act, the court said (P. 370):

"In view of all these considerations we ought to assume, until the state, through its judicial or administrative officers, places a different construction upon the act, that Section 20 will be limited in its operation to forfeiting for non-payment of the franchise tax only the privilege of doing intrastate business; or else that the section, being void for unconstitutionality, will be treated as severable from the other provisions of the act. Under either view, it is obvious, from what has already been said, that the tax does not amount to a regulation of or a burden upon interstate commerce."

In *People ex rel. Cornell Steamboat Company v. Sohmer*, 235 U. S. 549, the court held an annual excise tax or license fee equal to 5-10ths of 1 per cent upon gross earnings from transportation originating and terminating within the State of New York, imposed by that state on transportation and transmission corporations and associations for the privilege of carrying on business in the state in a corporate or organized capacity, was not an invalid regulation of commerce as applied to a navigation company engaged in the business of towing upon the Hudson River, under the authority of a license granted by the United States, since the charge was not upon the navigation of the river, but upon the doing of business within the state as a corporation of the state, and was not a taxation of interstate commerce. The court stated (P. 561):

"We are of the opinion that commerce thus carried on is not interstate commerce, beyond the taxing power of the state, and that the return on which the tax was assessed did not involve the revenues of commerce among the states and this contention must be rejected."

The court held in *Postal Telegraph-Cable Co. v. City of*

Freemont, 255 U. S. 124, that an ordinance which levied a license tax upon the businesses and occupations within the city, including telegraph lines and upon the latter a tax of $60.00 per year on the business of sending messages from the city to any place in the state and receiving messages transmitted from any place in the state to the city, was not unconstitutional because a burden upon interstate business merely because the local business was unprofitable since the state law afforded a means to prevent the tax from burdening the interstate business through an application to increase intrastate rates of which the company had not sought to avail itself.

In *Postal Telegraph-Cable Co. v. City of Richmond*, 249 U. S. 252, the court considered an ordinance by the city of Richmond which provided an annual license fee of $300.00 for the privilege of doing business within the city of Richmond but not including any business done to or from points without the state. It was claimed that the cost of doing intrastate business at Richmond was greater than the receipts from it and that since the taxes must be paid, if at all from interstate commerce they constitute such a burden upon that commerce of the company as to render them unconstitutional and void. The court said there was *no clear and convincing evidence that the tax falls upon interstate commerce*, which is necessary to justify the finding that the ordinance is unconstitutional and void.

In *Raley & Bros. v. Richardson*, 264 U. S. 157, the court considered a statute of Georgia which imposed a flat tax of $100 upon any broker or commission merchant buying

or selling merchandise on commission for another, or engaged in the business of receiving or distributing articles of merchandise shipped to such broker or merchant for distribution on account of the shipper. The court held that this law did not violate the interstate commerce clause and it was not void under the equal protection clause of the Fourteenth Amendment. The court cited with approval the decision in the case of *Kehrer v. Stewart,* supra, and speaking by Justice Sutherland, said:

> "Certainly one cannot avoid a tax upon a taxable business by also engaging in a nontaxable business."

The principle that a state may tax intrastate business is recognized in a late case of this court, *Sprout v. South Bend,* 277 U. S. 163. There the court considered an ordinance of South Bend, Indiana, which prohibited the operation on its streets of any motor bus for hire unless licensed by the city. Sprout operated a bus between points within South Bend and the City of Niles, Michigan. He paid the state registration fee but refused to pay the license fee of $50.00. Sprout made stops habitually within Indiana, in order to permit passengers from South Bend to leave the bus before the state line was reached, although they paid the fare to some Michigan point. The court, in holding the ordinance void, said:

> "The ordinance made no distinction between busses engaged exclusively in interstate commerce, those engaged exclusively in intrastate commerce, and those engaged in both classes of commerce. * * * (P. 167).
>
> "A state may, by appropriate legislation, require payment of an occupation tax from one engaged in both intrastate and interstate commerce. *Postal Telegraph Cable Co. v. Charleston,* 153 U. S. 692; *Os-*

borne v. Florida, 164 U. S. 650; *Kehrer v. Stewart*, 197 U. S. 60; *Watters v. Michigan*, 248 U. S. 65; *Raley & Bros. v. Richardson*, 264 U. S. 157. Compare *Interstate Busses Corporation v. Holyoke Street Ry. Co.*, 273 U. S. 45; *Arnold v. Hanna*, 276 U. S. 591. And it may delegate a part of that power to a municipality. Compare *Postal Telegraph-Cable Co. v. Richmond*, 249 U. S. 252, 257. *But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business;* that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business. *Leloup v. Port of Mobile*, 127 U. S. 640; *Crutcher v. Kentucky*, 141 U. S. 47, 58; *Adams Express Co. v. New York*, 232 U. S. 14, 30; *Bowman v. Continental Oil Co.*, 256 U. S. 642, 647. Compare *Williams v. Talladega*, 226 U. S. 404, 417; *Postal Telegraph-Cable Co. v. Richmond*, 249 U. S. 252." (170-171—Italics supplied).

While recognizing the right of the state to tax intrastate commerce, it will be seen that no distinction was made in the ordinance between intrastate and interstate commerce; that a flat license fee was charged; and that such fee was not charged for police regulation or for construction and maintenance of highways.

In *East Ohio Gas Company v. Tax Comm.*, 283 U. S. 465, the court considered and held valid an excise tax upon a gas company for the privilege of carrying on an intrastate business, the amount to be computed upon the gross receipts of the company on its intrastate business. The court quoted from the opinion in *Sprout v. South Bend*, which we have quoted above, and stated further (P. 472):

> "The Ohio statute does not purport to affect interstate commerce. The specified excise taxes are laid for the privilege of carrying on intrastate business. The amounts were calculated on gross receipts derived wholly from appellant's intrastate business notwithstanding the gas used had moved in intrastate commerce."

In the light of these cases it may be fairly stated that the license fee of the Montana statute is imposed solely on account of the intrastate business of the telephone company, measured by the number of telephones operated for local use for which a monthly rate is charged; that the amount of the tax is not increased because of the interstate business done; and that if the telephone company chose to engage exclusively in interstate business it would not be subject to the imposition of the tax as it need pay no license tax for its long distance calls, even those long distance calls which are entirely intrastate and which constitute the greater revenue for long distance calls. The company could discontinue the intrastate business without withdrawing from the interstate business.

After a review of the foregoing cases, we believe that the conclusion of Judge Garrecht, Circuit Judge, (R. 23) 7 Fed. Supp. 12, 14, is correct:

> "The license in question is nothing more than a tax. The penalty provided is but a mode of enforcing its payment. There is no restriction upon business in interstate commerce. From the record it appears that the fee or tax is imposed solely on account of the intrastate business. The amount exacted is not increased because of the interstate business done. One engaged exclusively in interstate commerce would not be subject to the imposition. The plaintiff could discontinue the intrastate business without withdrawing

also from interstate business. It is assumed in the opinion that to require the plaintiff, in order to save the tax, to discontinue its intrastate business would impose too great a burden upon it. If business done wholly within a state is within the taxing power of the state, the courts of the United States cannot review or correct the action of the state in the exercise of that power. Resultant hardship is not within their province to redress. *Postal Telegraph-Cable Co. v. Charleston City Council,* 153 U. S. 692, 14 S. Ct. 1094, 38 L. Ed. 871; *Postal Telegraph-Cable Co. v. Richmond,* 249 U. S. 252, 257, 39 S. Ct. 265, 63 L. Ed. 590."

A. IT IS CLAIMED THAT THE TAX IS VOID BECAUSE IT IS LEVIED UPON INSTRUMENTALITIES USED IN INTERSTATE COMMERCE.

But this is looking at the form and ignoring the substance of the law. It is apparent that the telephone instruments are mentioned specifically in the act simply for the reason that they determine the amount of intrastate business of a telephone company, minus, of course, the tolls for long distance intrastate calls. Each telephone registers the amount of intrastate business for that telephone. The act could as well have fixed and measured the amount of the tax by the number of persons who paid a monthly rate for the local use of the telephone. In that event it could not be said that the tax was levied upon such persons.

This court in *Western Union Tel. Co. v. Kansas,* 216 U. S. 1, held that in determining whether a statute does or does not burden interstate commerce, the court will look beyond mere form and consider the substance of things.

> "This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms,

but will look through forms to the substance of things. Such is an established rule of constitutional construction as the adjudged cases abundantly show." (P. 27).

In *Cudahy v. Hinkle,* 278 U. S. 460, 470, Mr. Justice Brandeis, in a dissenting opinion, quoted from *Postal Telegraph-Cable Co. v. Adams,* 155 U. S. 688, 698, as follows:

> "The substance and not the shadow determines the validity of the exercise of the (taxing) power."

The majority opinion of the lower court declared:

> "The suit is indistinguishable in principle from the *Adams Express Case,* 232 U. S. 14, 34 S. Ct. 203, 58 L. Ed. 483, and the *Continental Oil Case,* 256 U. S. 642, 41 S. Ct. 606, 65 L. Ed. 1139, the rule of which condemns the tax for repugnancy to the commerce clause of the Federal Constitution (Const. Art. 1, § 8, Cl. 3)."
>
> 7 *Fed. Supp.* 12, 13.

In the case of *Adams Express Co. v. New York,* supra, the court passed upon a group of ordinances of the City of New York, as applied to the Adams Express Company, an unincorporated association engaged in interstate commerce as a common carrier of packages. The Express Company did both an intrastate and an interstate business, the latter, however, in the number of packages carried, comprising 98 per cent of the total business transacted in New York City. Section 308 of the ordinance provided for an annual license fee, for each express wagon, of $5.00, and for each driver, 50c. Section 305 required that business of "expressmen" and others "must be duly licensed as herein provided." Section 306 read:

> "No person shall engage in or carry on any such business without a license therefor under a penalty

of not less than two dollars, nor more than twenty-five dollars for each offense, and for the purposes of this ordinance the term person shall include any human being or lawful association of such." (232 U. S. 24, 25).

The Express Company brought suit to restrain the enforcement of the ordinances on the ground that they constituted an unconstitutional interference with interstate commerce. The court held the ordinances void as imposing a burden upon interstate commerce but, as we understand the decision of the court, so held for the reason that Section 308 was linked with Section 305 and 306, and made the obtaining of a license as a condition precedent to conducting the interstate business of an express company. The court said:

> "But, if the above mentioned sections are to be deemed to require that a license must be obtained as a condition precedent to conducting the interstate business of an express company, we are of the opinion that so construed they would be clearly unconstitutional." (P. 31).

And again:

> "It would seem to follow, necessarily, that the annual license fees prescribed by § 308 * * * cannot be exacted, so far as the interstate business is concerned. * * *
>
> "The provisions of § 308 are inseparably connected with those of §§ 305 and 306. The sums fixed 'for each express wagon' and 'for each driver' measure the amount to be exacted for the granting of the license required for the carrying on of business. And it is difficult to see how the payment can be enforced as to the interstate business if the taking out of the license therefor cannot be compelled. (P. 33).
>
> "* * * a state law is unconstitutional and void which requires a party to take out a license for carry-

ing on interstate commerce, no matter how specious the pretext may be for imposing it." (P. 31).

Apparently the court held the ordinances void for the reason that they made the taking out of a license a condition precedent to carrying on interstate commerce. There was no attempt in the ordinance to distinguish between wagons used in intrastate commerce, those used in interstate commerce or those used in both. Under the Montana statute there is no condition precedent that the tax be paid before the telephone company may engage in interstate business. The company is free to engage in interstate business whether it pays the tax or not.

In *Bowman v. Continental Oil Co.*, 256 U. S. 642, an act of the legislature imposing an excise tax of 2c upon each gallon of gasoline sold or used and an annual license tax of $50.00 for each distributing station or place of business, was considered. The statute was held invalid on the ground that it was inseparable and that by both its terms and its legal operation and effect the tax was imposed generally upon the entire business, including interstate commerce, as well as domestic commerce. In this case the court said:

> "The applicable rule is that laid down in *Ratterman v. Western Union Telegraph Co.*, 127 U. S. 411, where, in response to a question whether a single tax, assessed by a state upon the receipts of a telegraph company derived partly from interstate commerce and partly from commerce within the State, but returned and assessed in gross and without separation or apportionment, was wholly invalid or invalid only in proportion and to the extent that the receipts were derived from interstate commerce, this court unanimously answered that so far as levied upon receipts

derived from interstate commerce the tax was void, but so far as levied upon receipts from commerce wholly within the State it was valid. This case has been cited repeatedly with approval and its principle accepted. *Western Union Telegraph Co. v. Alabama*, 132 U. S. 472, 476-477; *Leghigh Valley R. R. Co. v. Pennsylvania*, 145 U. S. 192, 200-201; *Postal Telegraph Cable Co. v. Charleston*, 153 U. S. 692, 697; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 31." (PP. 646-647).

On the question of severability after stating its hesitation, in advance of a declaration by the court of last resort of the state, to adopt a construction bringing the law into conflict with the federal constitution, the court said:

> "The act, in its 2d section, requires every distributor of gasoline to pay an annual license tax of $50 for each distributing station or place of business or agency; requires it to be paid in advance; and renders it unlawful to carry on the business without having paid it.
>
> "The subject taxed is not in its nature divisible, as in the case of the excise tax. *The imposition falls upon the entire business indiscriminately; and so does the prohibition against the further conduct of business without making the payment.* By accepted canons of construction, the provisions of the act in respect of this tax are not capable of separation so as to confine them to domestic trade, leaving interstate commerce exempt. *United States v. Reese*, 92 U. S. 214, 221; *Trade-Mark Cases*, 100 U. S. 82, 99; *Poindexter v. Greenhow*, 114 U. S. 270, 304-305; *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601, 636." (Italics supplied).

As hereinbefore pointed out, the Montana Supreme Court in *State v. Rocky Mountain Bell Telephone Company*, 27 Mont. 394, 71 Pac. 311, in considering a similar act, construed it as applying only to intrastate busi-

ness and quoted the Utah Supreme Court in *Ogden City v. Crossman,* 17 Utah 66, 53 Pac. 985, where the Utah Court construed an almost identical statute as applicable to and affecting local business only and not applicable to or affecting in any manner interstate commerce.

In a later case, *Sonneborn Bros. v. Cureton,* 262 U. S. 506, 519, the court said this:

> "The main point decided in the *Bowman Case* was that a license tax law which imposed a *lump tax as a condition of doing business,* part of which it was unlawful under the Federal Constitution to tax, must be declared void, though the other part of the business might have been properly the subject of such a tax." (Italics supplied).

The statute considered in the *Bowman Case,* levied a tax of $50 against all distributing stations. The statute in the case at bar levies a tax of $2 on such telephone instruments which pay a certain specified rate per month. Telephone instruments for which a monthly rate is not charged, in other words, those not used for intrastate business and instruments for which the monthly charge is under a specified rate, are exempt. In the *Bowman Case* no attempt was made to segregate interstate and intrastate business and to tax the latter but a lump sum was levied against all stations. In other words, it amounted to a gross tax against all of the business of the company and therefore was a burden upon interstate commerce. The court has frequently held such laws unconstitutional.

State Freight Tax, 15 Wall. 232, 276, 277;
Fargo v. Michigan, 121 U. S. 230, 244;
Philadelphia & Southern S. S. Co. v. Pennsylvania, 122 U. S. 326, 336;

Leloup v. Port of Mobile, 127 U. S. 640, 648;
McCall v. California, 136 U. S. 104, 109;
Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U. S. 217, 227;
Crew Levick Co. v. Pennsylvania, 245 U. S. 292.

On the contrary, in the case at bar, considering the substance and not the form of the act, it is clear that it was the intention of the legislature to tax only intrastate business and that the telephone instruments are selected solely for the purpose of measuring or fixing the amount of tax on such intrastate business. In effect, it is exactly the same as having the telephone company report the gross revenue for intrastate business and then levying a tax thereon. Whether the number of instruments used for intrastate business or the gross revenue from intrastate business of these instruments is selected to measure the tax, is immaterial. The purpose and effect is the same, if we have regard to substance rather than form.

This court has stated that the question in each case is a practical one and must be decided on the special facts in each case. It was said in *Hump Hairpin Co. v. Emmerson*, 258 U. S. 290, 295:

> "No formula has yet been devised by which it can be determined in all cases whether or not such a tax is valid, and, applying the repeated declaration of this court, in the cases cited and in many others, that the question is inherently a practical one, depending for its decision on the special facts of each case, we are clear that the tax here involved falls within the excepted class described, even though the business done with residents of states other than Illinois be regarded as interstate."

In that case the court was considering an Illinois law

for taxing foreign corporations for the privilege of doing local business, which based the tax upon the capital stock actually represented by property located and business transacted within the state. The court held that there was plainly no intent to tax interstate commerce and that the tax assessed under it was not unconstitutional merely because a trifling part resulted from inclusion of interstate business in the basis of computation. We consider the following language of the court as pertinent:

> "If this same amount of tax had been imposed upon such a manufacturing corporation as we have here without reference being made to the basis of its computation, very certainly no objection to its validity would have been thought of (142 U. S. supra, p. 229). Or if the State had imposed an income tax, a part of which would have been derived from the net profits on this same interstate business, no valid objection could have been made to it. (*United States Glue Co. v. Oak Creek*, supra. *At most the assessment, so far as interstate commerce is concerned, is incidental, remote and unimportant and it is therefore constitutional.*" (P. 296). (Italics supplied).

We should like to call attention to the following language used by the court in this case:

> "* * * on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights. As coming within this latter description, taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce) to be assessed, that the principle of

the cases so holding must be regarded as a settled exception to the general rule. (Citing Cases). The turning point of these decisions is, whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, *or whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it.*" (PP. 294-295). (Italics supplied).

During the year of 1933, after March 16, the record shows that more than two-thirds of the telephone instruments were not used even once for interstate or foreign purposes. (R. 34). It is common knowledge that the ordinary telephone is seldom used for long distance calls either intrastate or interstate. True, the telephone instruments have a potential use for such business but potential use or even occasional use is remote, uncertain, indefinite and incidental and should not justify their classification as instrumentalities of interstate or foreign commerce, so as to prevent a state from levying a license tax thereon when in a given year most all such telephone instruments are, in fact, used exclusively and the others almost exclusively for intrastate business and the statute on its face purports to levy a license tax only for such intrastate use or upon the intrastate business of a telephone company measured by such use.

B. ALTHOUGH AN EXCISE TAX MAY HAVE AN INDIRECT AND INCIDENTAL EFFECT UPON INTERSTATE COMMERCE, IT IS NOT FOR THAT REASON UNCONSTITUTIONAL.

Ad valorem taxes upon property used in interstate commerce do indirectly and incidentally affect or burden in-

terstate commerce yet it has never been held that such taxes are for that reason in contravention of the commerce clause of the constitution and void. In *Virginia v. Imperial Coal Sales Company, Incorporated*, ... U. S. ....., decided November 5, 1934, the court, speaking by Mr. Chief Justice Hughes, said:

> "Property having its situs within the taxing state is not exempt from a non-discriminatory property tax merely because the property is used in interstate commerce. Corporations engaged in interstate commerce should bear their proper share of the burdens of the government under whose protection they conduct their operations, and non-discriminatory taxation of their property although used in interstate commerce, as this Court has frequently said, affects that commerce only incidentally and is not inconsistent with the constitutional immunity from the imposition of direct burdens. *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, 696; *Adams Express Co. v. Ohio*, 165 U. S. 194, 220; *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U. S. 160, 163; *United States Express Co. v. Minnesota*, 223 U. S. 335, 344; *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, 453; *Wells, Fargo & Co. v. Nevada*, 248 U. S. 165, 166, 167; *Eastern Air Transport v. Tax Commission*, 285 U. S. 147, 152."

The same is true of license taxes for police regulations. See *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 492; *Western Union Telegraph Company v. James*, 162 U. S. 650; *New York Etc. Rd. Co., v. New York*, 165 U. S. 628; *Lake Shore Etc. Co. v. Ohio*, 173 U. S. 285; *Atl. & Pac. Rd. Co. v. Larabie Flour Mill Company*, 211 U. S. 612; *Houston & Texas R. Co. v. Mayes*, 201 U. S. 321; *Atlantic Coast Line v. Wharton*, 207 U. S. 328, 334.

The same rule applies to excise taxes upon local or domestic business. Such taxes, while they may indirectly or incidentally affect interstate commerce, are not a direct burden and not a violation of the interstate commerce clause.

In *Allen v. Pullman Co.*, 191 U. S. 171, 181, this court said:

> "* * * The corresponding right of the state to tax and control the internal business of the state, altho thereby foreign or interstate commerce may be indirectly affected, has been recognized with equal clearness."

This language was quoted in *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 44; see also *Osborne v. Florida*, supra, and the other cases cited in this brief, under I, and *Hump Hairpin Co. v. Emmerson*, supra, and the language quoted under "A" herein.

In *Boston & Maine R. Co. v. Armburg*, 285 U. S. 234, 238, this court said:

> "The interstate commerce clause did not withdraw from the states the power to legislate with respect to their local concerns, even though such legislation may indirectly and incidentally affect interstate commerce and persons engaged in it. *Sherlock v. Alling*, 93 U. S. 99, 103; *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 26; also *Interstate Busses Corp. v. Holyoke St. Ry. Co.*, 273 U. S. 45, 52; *Chicago, Milwaukee & St. Paul Ry. Co. v. Solan*, 169 U. S. 133, 137, 138."

While the record shows that about one-third of the telephone instruments were used in interstate calls some time between March 16, 1933, and January 1, 1934, it is common knowledge that the number of times a telephone is used for interstate use is very small compared to the num-

ber of times a telephone is used for local use. Doubtless the number of such calls is but a fraction of 1 per cent. Even if the tax be considered to be upon the telephone instruments (it is our view as elsewhere stated that it is so in form only and that the instruments are named merely to measure the amount of the intrastate business to be taxed), the effect upon interstate commerce would be only incidental or remote, "so that the tax is not in reality a burden, although in form it may touch, and, in fact, distantly affect it." (*Hump Hairpin Co. v. Emmerson*, 258 U. S. 290). It is not any less indirect or remote than was the license tax on gasoline in Wyoming considered by this court in *Edelman v. Boeing Air Transp.*, 289 U. S. 249, where it was held that a state license tax of 4 cents per gallon on gasoline used or sold, may constitutionally be imposed on gasoline that has been imported and stored by an air-transport company and is drawn from the tanks to fill the airplanes that use it in interstate commerce, if the use to which the tax is applied is in the withdrawal of the gasoline from the tanks and the placing of it in the fuel tanks of the planes, before its use in interstate transportation begins. The court pointed out that the interpretation given to the statute in that case was not such as was given in the case of *Helson v. Kentucky*, 279 U. S. 245, where the tax was levied on gasoline used in interstate commerce. The Montana license tax might be considered a tax for the use of telephone instruments for interstate business. No tax is levied for the use of the instruments within the state for interstate commerce and hence does not fall within the prohibition stated in the *Helson Case*.

In the *Edelman Case,* the court said:

> "As the exercise of the powers taxed, the storage and withdrawal from storage of the gasoline, was complete before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce, to transgress constitutional limitations." (P. 252).

To the same effect was the decision in *Nashville, C. & St. L. Ry. v. Wallace,* 288 U. S. 249, concerning a similar tax at 2c per gallon on gasoline sold or stored even though the gasoline was later used in interstate commerce. The court in that case, said:

> "The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce and the burden of it is too indirect and remote from the function of interstate commerce itself to transgress constitutional limitations. See *Eastern Air Transport v. Tax Commission,* 285 U. S. 147)" (P. 268).

In *Eastern Air Transport v. Tax Comm.,* 285 U. S. 147, it was held that a 6 cent per gallon tax on sales of gasoline was not a direct burden upon interstate commerce even though the gasoline was used in planes engaged exclusively in interstate transportation. Quoting from *New Jersey Telephone Co. v. Tax Board,* 280 U. S. 338, 346, "it is elementary that a state may tax property used to carry on interstate commerce," the court distinguished that case from the *Helson Case,* on the ground that in the latter case "the court found that the tax was laid directly upon the *use* of the gasoline in interstate transportation." The court said further:

> "A non-discriminatory tax upon local sales in such

> cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected." (P. 153).

In effect, the Montana tax, even if it be considered to be upon the telephone instruments, is nothing more than *a tax upon the local use of such instruments*; it is not a direct burden upon interstate commerce. No tax is laid upon the *use* of telephones for long distance calls or upon the tolls from such calls. The company need take out no license and pay no tax for doing an interstate business nor is the payment of the tax for the local use made a condition precedent to the use of a telephone for interstate purposes. A *practical* interpretation should be given to the act. The words of Mr. Justice Stone, in his concurring opinion in the *Helson Case*, are apt:

> "Nor can I find any *practical* justification for this distinction or for an interpretation of the commerce clause which would relieve those engaged in interstate commerce from their fair share of the expense of government of the states in which they operate by exempting them from the payment of a tax of general application, *which is neither aimed at nor discriminates against interstate commerce.* It 'affects commerce among the states and impedes the transit of persons and property from one state to another *just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed.' Delaware Railroad Tax*, 18 Wall. 206, 232." (P. 253—Italics supplied).

C. THE TELEPHONE COMPANY MAY DISCONTINUE ITS INTRASTATE BUSINESS WITHOUT WITHDRAWING ALSO FROM INTERSTATE COMMERCE.

It was argued in the court below that,

> "By virtue of the grant of the right under the Montana Constitution to construct, maintain and operate its telephone system, and the acceptance of that grant by the company, the company is required to conduct its local business in Montana, and cannot abandon it while continuing to conduct interstate and foreign business, and by virtue also of the inherent character of the telephone business, the company could not undertake to furnish the extensive facilities for interstate communication without maintaining that system also for purpose of intrastate communication. Therefore, the imposition of this tax is a burden upon its interstate and foreign commerce."

Two questions are presented by this argument, one of practicability and the other of legal right:

1. Has the telephone company the legal right to discontinue intrastate business without withdrawing also from interstate commerce? Section 14, Article XV, of the Montana Constitution, reads:

> "Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct or maintain lines of telegraph or telephone within this state, and connect the same with other lines; and the legislative assembly shall by general law of uniform operation provide reasonable regulations to give full effect to this section. * * *."

We find nothing in the Constitution or Laws of Montana, which would compel the telephone company to operate its intrastate business at a loss, should the telephone company determine that it is not profitable to pay the tax

and therefore discontinue its intrastate business. The permissive character provided by the Constitution does not create any obligation on the part of the company to operate at a loss. If the company can not profitably continue its operations, it may discontinue them. To compel it to operate at a loss would be in violation of the due process clause of the Constitution. This question came up squarely in *Railroad Company v. Eastern Texas R. R.*, 264 U. S. 79, where the court considered the question whether the Eastern Texas Railroad had the legal right to dismantle and abandon its road when it was not profitable to continue. It was contended that the company did not have the right to withdraw from intrastate commerce until its charter expired. It was argued for the company, on the other hand, that the state statutes neither prohibited the dismantling and abandonment of the road nor lay upon the company the duty to operate it at a loss and that if they did, they deprived the company of its property without due process of law and in that respect were in conflict with the Fourteenth Amendment of the Constitution of the United States. In rejecting the view of the Railroad Company and sustaining that of the company, the court said:

> "The usual permissive charter of a railroad company does not give rise to any obligation on the part of the company to operate its road at a loss. No contract that it will do so can be elicited from the acceptance of the charter or from putting the road in operation. The company, although devoting its property to the use of the public, does not do so irrevocably or absolutely, but on condition that the public shall supply sufficient traffic on a reasonable rate

basis to yield a fair return. And if at any time it develops with reasonable certainty that future operation must be at a loss, the company may discontinue operation and get what it can out of the property by dismantling the road. To compel it to go on at a loss or to give up the salvage value would be to take its property without the just compensation which is a part of due process of law. The controlling principle is the same that is applied in the many cases in which the constitutionality of a rate is held to depend upon whether it yields a fair return. *Brooks-Scanlon Co. v. Railroad Company of Louisiana,* 251 U. S. 396, 399; *Bullock v. Railroad Commission of Florida,* 254 U. S. 513, 520; *State ex rel. Cunningham v. Jack,* 113 Fed. 823; s. c. 145 Fed. 281; *Iowa v. Old Colony Trust Co.,* 215 Fed. 307, 312; *Northern Pacific R. R. Co. v. Dustin,* 142 U. S. 492, 499; *Commonwealth v. Fitchburg R. R. Co.,* 12 Gray, 180, 190; *State v. Dodge City, etc., Ry. Co.,* 53 Kan. 329, 336." (P. 85).

2. But Judge Bourquin, speaking for the majority in the court below, apparently conceding the legal right of the telephone company to discontinue its intrastate business without withdrawing also from its interstate business, stated that it would not be practicable to do so. He said that this court, in the *Sprout Case,* 277 U. S. 171, speaking by Mr. Justice Brandeis, in stating, in order that a fee or tax be valid, it must appear that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business, evidently meant that "withdrawal to escape the tax must be practicable."

As we understand the case of *Sprout v. South Bend,* supra, the tax was held void because it did not appear that it was imposed solely on account of the intrastate busi-

ness. (See syllabus, paragraph 6, 277 U. S. 163). The practicability of discontinuing the intrastate business while continuing the interstate business was not considered by the Supreme Court of Indiana, nor was it discussed by this court, for the court said:

> "The Supreme Court of Indiana, far from construing the ordinance as applicable solely to business engaged in intrastate commerce, assumed that it applied to busses engaged exclusively in interstate commerce and that Sprout was so engaged." (P. 171).

In *Pullman v. Adams,* 189 U. S. 420, a tax of $100 on sleeping cars carrying passengers from one point to another within the state, and 25c per mile for each mile of track over which the company ran its cars, was upheld on the assumption that the company would be held free to abandon the business taxed, if it saw fit. The court said:

> "If the clause of the state constitution referred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid. For then it would seem to be true that the state constitution and the statute combined would impose a burden on commerce between the States analogous to that which was held bad in *Crutcher v. Kentucky,* 141 U. S. 47. On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the State, the case is governed by *Osborne v. Florida,* 164 U. S. 650. *The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce.* * * *
>
> "* * * If the constitution of Mississippi should be read as imposing an obligation to take local passengers, the question for us might be which, if not both, the clause of the constitution or the tax act, is in-

valid." (PP. 421-422—Italicts supplied).

The court later in *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 41, said of the *Adams Case*:

> "So, that what was actually decided in the *Adams Case* (*Pullman Co. v. Adams*, 189 U. S. 420, 429) was that the company was under no obligation to take local passengers, but if it chose to do that kind of business the privilege for doing it could be taxed by the State. The court did not hold that the State could, in any form, *directly* burden interstate commerce. It really held to the contrary."

It is evident that in these cases the practicability of discontinuing intrastate commerce while continuing interstate commerce, was not considered. It must be conceded that railroad companies and sleeping car companies use the same facilities for both intrastate and interstate commerce and that it would be just as impracticable for them to discontinue the intrastate business as it would be for the telegraph company to do so. It would seem, therefore, that what the court had in mind in the *Sprout Case,* supra, was that one doing an interstate and intrastate commerce could not be taxed for the intrastate commerce unless he is *legally free* to withdraw from the latter so as to avoid the burden of the tax. If the telephone company has linked its interstate business to its intrastate business so that it cannot profitably continue the latter, it is no fault of the state's and the company should not for that reason avoid the tax. Appellee would revise the language of the *Sprout Case* so that it would read, 'but in order that a fee or a tax may be valid, it must appear * * * that it would be *practicable*, for the person taxed to discontinue the intrastate business without with-

drawing also from the interstate business.'

If this is what the court meant, it would seem to be impossible to tax the intrastate business of any railroad, express, sleeping car, telegraph, telephone company, or other public service corporations as it would certainly be impracticable for any of them to discontinue intrastate business while continuing interstate business for the same instruments and facilities are undoubtedly used in both. No reason, however, is given why it should discontinue its intrastate business to avoid payment of the tax thereon. If it is argued that the intrastate business would be unprofitable on account of the tax, it may be answered that the company has its proper remedy and that it may increase its rates so that the business may be profitable.

D. IT IS CLAIMED THAT THE ACT IMPOSES A BURDEN UPON INTERSTATE COMMERCE FOR THE REASON THAT IT REQUIRES THE TAX TO BE WHOLLY PAID BY THE COMPANY AND DOES NOT PERMIT THE TAX TO BE PASSED ON TO THE CONSUMER AS AN OPERATING EXPENSE.

True, the original act contained a clause to the effect that the rates charged the patrons and users shall not be affected by the tax but that it shall be borne entirely by the owning and operating concern. This clause, however, was eliminated in the amendment provided by Chapter 54, Laws of 1933-34, (See Appendix) which merely provides:

> "No bill, statement or tax rendered or given any customer by any telephone company shall set out or contain, as a separate item, any amount or account or by reason of the license tax imposed by this act."

If this point is well taken so far as the first act is con-

cerned and that part of the act is unconstitutional and void, the rest of the act may nevertheless stand. It is apparent that the legislature would have passed the first act without this provision as the same legislative assembly did so within a year following the passage of the first act. The rule is stated in 59 C. J. 639:

> "A statute may, however, be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected, and this rule applies, even though the constitutional and unconstitutional parts are in the same section of the act; * * *."

We call attention to the great number of cases from this court, as well as the federal and state courts, cited in footnote 13 in support of the above.

Furthermore, it does not appear that the appellee has made application to the Public Service Commission of Montana, for the purpose of increasing its rates as provided by Chapter 260, Part III of the Political Code of Montana, R. C. M. 1921, on the theory that the taxes should have been charged to operating expense.

See also *Postal Telegraph-Cable Co. v. City of Freemont*, 255 U. S. 124, 41 Sup. Ct. Rep. 279.

If such tax may be included in the operating cost and passed on to the user or subscriber (there being nothing in the second act to prevent it, and that part of the original act which forbids it, being unconstitutional), then there is no force to appellee's argument. There would be no reason why appellee should consider abandoning its intrastate business. For all practical purposes the tele-

phone company merely becomes a tax collector for the State of Montana, and it has no reason to complain. There is no reason why it should operate the two fanciful systems—one interstate and one intrastate, as argued in the court below.

E. A SIMILAR ACT HAS BEEN CONSTRUED BY MONTANA COURT.

As pointed out herein, in *Ogden City v. Crossman*, 17 Utah 66, 53 Pac. 985, the Utah Court, in construing an ordinance almost identical with the Montana statute, which ordinance provided for a license fee of $5.00 for each telephone instrument for which a rental charge is made, held that the ordinance was not intended to, and did not apply to, or affect in any manner, business which is interstate in character and that it was intended to, and did apply to, and affect only the local business within Ogden City, *(as shown from the rental of the instrument for use in Ogden City alone")*; and that by operating and maintaining such telephones in Ogden City "and making and receiving a rental for the *use of the instruments therein,* and for no other place," the company became amenable to the ordinance, since a business done wholly within a city was amenable to the taxing power of the city. The court declared:

> "The defendant corporation is not exempt from the operation of the ordinance and the payment of a license upon its instruments or business which arises and is conducted wholly within Ogden City, *even tho at the same time the defendant corporation may do business or use its instruments in Ogden City for business which is in part interstate in its character.*

> We are of the opinion that the ordinance does not affect or apply to this latter class of business which is interstate in its character." (Citing *Osborne v. State of Florida*, 164 U. S. 650; *Postal Tel. Cable Co. v. City of Charleston*, 153 U. S. 692, and other cases). (P. 76—Italics supplied).

Several years later, the Montana Supreme Court, in *State v. Rocky Mountain Bell Tel. Co.*, 27 Mont. 394, 71 Pac. 311, had occasion to construe a statute which read:

> "Every person * * * doing business in this state as a telephone company must pay a license, in each county where such business is transacted, of 75 cents per year for each instrument in use."

A comparison shows that the attempt to discriminate between intrastate and interstate business was less apparent in that statute than was the attempt in the Ogden City ordinance and the present statute, yet the Montana Court held that this statute *by express terms discriminated between local and interstate business* and that it was the intention of the legislature that only local or intrastate business should be subject to the license tax. (See also *State v. Northern Pacific Express Co.*, 27 Mont. 419, 425, 71 Pac. 404, where the court, after reviewing the cases, including the *Ogden City Case*, referred to the former case of *State v. Rocky Mountain Bell Tel Co.*, as so holding).

By giving the statute that construction the Montana Court held that it meant the same as the Ogden City ordinance, and quoted at length from the *Ogden City Case*, including the language we have set out above. In other words, the court held that the statute was not intended to, and did not apply to, or affect in any manner business

which is interstate in character. The court said:

> "It is to be presumed that in enacting Section 4071 above, and in using therein the terms '*doing business in this state*,' the legislature did so in view of the constitutional provision conferring upon congress the sole power to regulate interstate commerce, and it will not be implied that it intended to go beyond its lawful powers, and in the absence of express statutory terms directly contravening those provisions." (P. 401—Italics supplied).

After reviewing and comparing the cases, the court quoted from *Osborne v. State of Florida*, supra:

> "Those expressions are to be viewed with reference to the circumstances under which the supreme court of the United States was then speaking. The state courts which it was reveiwing had each declared, in effect, that these statutes were binding upon and effectual as to companies as doers of interstate business, or, in other words, were a bar to their doing interstate business, without having complied with their requirements. *This construction has become, in so far as the federal tribunals were concerned, binding upon the federal court as to the effect of each statute within the state enacting it, as much as if it had been expressly stated in the act.*" (P. 404—Italics supplied).

Regarding the construction given to its statute by a state court, this court in the *Osborne Case* said:

> "The particular construction to be given to this state statute is a question for the state court to deal with, and in such a case as this we follow the construction given by the state court to the statutes of its own state court to the statutes of its own state. *Leffingwell v. Warren*, 2 Black, 599; *People v. Weaver*, 100 U. S. 539, 541; *Noble v. Mitchell*, 164 U. S. 367, 372, and cases there cited." * * * (P. 654).
>
> "Upon the construction given it by the state court

the statute does not violate any provision of the Federal Constitution, and the judgment of that court is, therefore, affirmed." (P. 656).

See also *Ohio River & W. R. Co. v. Dittey*, 232 U. S. 576 (supra); *St. Louis Southwestern Railway Co. v. Arkansas*, 235 U. S. 350 (supra); *Campbell v. City of Olney*, 262 U. S. 354; *In re Floyd and Hayes*, 225 Fed. 262, 265.

We submit that if the Montana Court could hold that the earlier statute (Section 4071) by express terms discriminated between local and interstate business, that it would find no difficulty in so construing the present statute.

F. THE COURT ERRED IN FINDINGS OF FACT. SPECIFICATION OF ERRORS I-III.

Under the view we have taken of this question, supra, it is not material whether the telephone instruments used exclusively or almost exclusively for intrastate commerce may occasionally also be used or have a potential use for interstate messages, since the license tax is, in substance, upon intrastate commerce, the amount thereof being measured by the number of instruments used within the state for intrastate business.

On May 29, 1934, when the court made its findings of fact and rendered its decree enjoining the state from the collection of the tax, the record shows (R. 34) that more than two-thirds of the telephone instruments owned and used by appellee in Montana, for which a monthly rate of the amount specified in the original act was paid, had not been used even once for interstate or foreign messages from March 16, 1933, when the original act became effective, to the end of the year. Until a telephone instrument

is actually used in interstate or foreign commerce, it could hardly be classified as an instrumentality of interstate or foreign commerce and the court therefore erred in finding that all of the telephone instruments were instrumentalities of interstate commerce in 1933. Even if it be assumed that those telephone instruments (the exact number of which was not shown) actually used one or more times in interstate or foreign commerce, should not be required to pay the tax, it does not follow that the collection of the tax should be enjoined as to those not so used.

The record, of course, does not show the number of telephones used in interstate or foreign commerce in 1934. Since it is likely that more than half of them were not so used, and since many of them may not be so used for many years, and since some of them may never be so used, we believe the court erred in finding (paragraph 9, Findings of Fact; R. 25; Specification of Error II) that "all the telephones" are instrumentalities of interstate or foreign commerce. If the use determines the character of the instrumentalities then there was no proof that all the telephone instruments were instrumentalities of interstate or foreign commerce. The burden of proof was upon appellee. (*State v. Rocky Mountain Bell Tel. Co.*, 27 Mont. 394). *A potential use, or even an occasional use for interstate or foreign commerce, is too remote, indefinite and indirect to permit such instruments to be classified as instrumentalities of interstate or foreign commerce, when, in fact, such instruments are used exclusively or almost exclusively for intrastate commerce.* No construction, in this respect, has been given to the act by the officials who collect

the tax or by the Supreme Court of Montana.

If in its finding, paragraph 8, Findings of Fact (R. 25, Specification of Error I), the court used the word "may" as meaning "can", having reference to potential use, then possibly there is evidence to support it. If, on the other hand, the court used it as expressing an immediate probability that all telephones would be used in interstate or foreign business, then we believe there is not sufficient evidence to support it.

We maintain that it was not material to find whether it was possible or practicable for appellee to discontinue its intrastate business without withdrawing from its interstate or foreign business, but, if it was, then the evidence was insufficient to support the finding that "plaintiff could not discontinue its intrastate business and operations in Montana, without virtually destroying and being compelled to abandon and withdraw from its interstate and foreign business." (Specification of Error III; R. 26). We shall not review the evidence as it is brief (R. 32-45) but at most it would show a possible inconvenience to the appellee. Aside from the conclusion of R. M. Morris, the sole witness for appellee, to which objection was made (R. 39), we believe there is not sufficient evidence in the record to support such a broad and comprehensive finding by the court.

The court below granted a permanent injunction against the enforcement of the tax on the sole ground that it was in violation of the commerce clause of the United States Constitution. Other questions were presented by the

pleadings and briefs but so far as the opinion of the court shows, were not determined by the court below. Since, however, other legal questions were presented by the pleadings and were argued, we shall consider them briefly.

II

IMPAIRMENT OF THE OBLIGATION OF A CONTRACT

It is claimed that the statute impairs the obligation of a contract existing between the Telephone Company and the State of Montana, which resulted from the acceptance by the company of the grant of the right to construct, maintain and operate its system and conduct its business in Montana, and that the impairing of such obligation is in violation of Section 10, Article I, of the Federal Constitution. We know of no case holding that the state cannot collect a just and proper and otherwise valid tax on the intrastate business of a public service corporation doing business in the state under a permissive charter authorized by Section 14, Article XV, of the Montana Constitution, (See I. C. herein) on the theory that to do so would impair the obligation of a contract. There does not exist any contract between the Telephone Company and the State of Montana, by which the state is prevented from levying a proper tax unon the company. Such power can never be relinquished or suspended by the state. Section 7, Article XII, of the Montana Constitution, provides:

> "The power to tax corporations or corporate property shall never be relinquished or suspended, and all corporations in this state, or doing business therein, shall be subject to taxation for state, county, school, municipal and other purposes, on real and personal

property owned or used by them and not by this constitution exempted from taxation."

No case was cited below by the appellee, holding that the state's power to levy a tax is limited by the clause in the Constitution which forbids the impairment of the obligation of a contract. The Telephone Company cannot claim immunity from taxation by reason of any such constitutional provision or by reason of a statutory grant or contract arising from a charter to do business in the state.

III

EQUAL PROTECTION OF THE LAW

It is claimed further by the appellee that the statute is unconstitutional because it is denied the equal protection of the law guaranteed by the Fourteenth Amendment, for the reason that some of the telephones, those for which a sum less than a certain rate per month is charged, are exempt, and for the reason that the original act contained a graduated scale. (Section 1, Chapter 174, Laws of 1933—Appendix). This question has been before this court in a number of recent cases. One of them is *Tax Commissioners v. Jackson,* 283 U. S. 527, where the court considered a chain store tax and held it constitutional. The annual license increased progressively with the number of stores under the same general management, supervision or ownership. The court held that the classification was neither unreasonable nor arbitrary and that there were substantial and significant differences between the business and operation of the two kinds of stores. Mr. Justice Roberts, speaking for the court, said:

"The principles which govern the decision of this

cause are well settled. The power of taxation is fundamental to the very existence of the government of the States. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. *Bell's Gap R. Co. v. Pennsylvania,* 134 U. S. 232; *Southwestern Oil Co. v. Texas,* 217 U. S. 114; *Brown-Forman Co. v. Kentucky,* 217 U. S. 563. The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, *American Sugar Rfg. Co. v. Louisiana,* 179 U. S. 89, or if any state of facts reasonably can be conceived to sustain it. *Rast v. VanDeman & Lewis Co.,* 240 U. S. 342; *Quong Wing v. Kirkendall,* 223 U. S. 59. As was said in *Brown-Forman Co. v. Kentucky,* supra, at p. 573:

"'A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.'

"It is not the function of this Court in cases like the present to consider the propriety or justness of the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the Court make this abundantly clear." (pp. 537-538).

Among the other cases reviewed by the Court in that

case are the following:

American Sugar Rfg. Co. v. Louisiana, 179 U. S. 89, holding that a license tax imposed upon persons and corporations carrying on the business of refining sugar and molasses, which excepted planters and farmers grinding and refining their own sugar and molasses, did not work an unconstitutional discrimination.

Quong Wing v. Kirkendall, 223 U. S. 59, holding that a Montana statute imposing a license fee on hand laundries did not constitute a denial of the equal protection of the laws because it did not apply to steam laundries and because it exempted from its operation laundries not employing more than two women.

Metropolis Theatre Co. v. Chicago, 228 U. S. 61, holding that an ordinance which classified theatres for license fees based on and graded according to the admission charged, was not unconstitutional although it was shown that some of the theatres charging a higher admission had less revenue than those charging a smaller admission and therefore paying lower license fees.

See also:

Cargill v. Minnesota, 180 U. S. 452;
Armour Packing Co. v. Lacy, 200 U. S. 226;
Bradley v. Richmond, 227 U. S. 477;
Singer Sewing Machine Co. v. Brickell, 233 U. S. 304;
Rast v. Van Deman & Lewis Co., 240 U. S. 342;
Armour & Co. v. Virginia, 246 U. S. 1;
Bronson v. Brush, 251 U. S. 182;
Alward v. Johnson, 282 U. S. 509;
Consolidated Coal Co. v. Illinois, 185 U. S. 203.

In the latter case it is held that a law for the inspection of mines was not unconstitutional by reason of its

limitation to mines where more than five men are employed at one time.

In *Citizens Tel. Co. v. Fuller*, 229 U. S. 322, it was held that there was a clear and reasonable distinction on which to base a classification for taxation between telegraph and telephone corporations conducting for profit large businesses and having offices and exchanges in cities and villages and those conducting a very small business for a mutual convenience of the incorporators. In this case the Michigan law exempted corporations having gross receipts of less than $500.00.

In *O'Connell v. State Board of Equalization*, 95 Mont. 91, 25 Pac. (2d) 114-199, the Montana court held constitutional a clause exempting corporate incomes from payment of an income tax.

In view of these cases and many others which might be cited, we do not believe that it can be said that the ground for classification in the statute under consideration, was unreasonable or arbitrary.

The various income tax laws with the exemptions thereunder by which some people pay no income tax at all have not for that reason been held unconstitutional.

It is claimed further that because of the severity of the penalty imposed by Section 3 for the violation of the Act, the appellee is denied the equal protection of the law. The case of *Missouri Pacific Ry. Co. v. Tucker*, 230 U. S. 340, was cited in the court below. The act in that case provided not as a *penalty* for violation of the Act, but as *liquidated damages* for excessive charges, the sum of $500.00. True, as was stated by Mr. Justice VanDevanter,

the Railroad Company *claimed* that the provision for liquidated damages denied it the *equal protection of the law*, but the court did not so hold. The court simply held that the imposition of $500.00 as liquidated damages, regardless of the amount of the over-charge, was so arbitrary and oppressive as to amount to the "taking of property *without due process of law.*" (p. 351). That decision does not support appellee's claim. It was undoubtedly correct but, as we have pointed out, it was a case of excessive liquidated damages for excessive charges and not a penalty for violation of the law. A different principle was involved.

Appellee also cited *Ex parte Young*, 209 U. S. 123. The Act considered in that case fixed 2c per mile as the maximum passenger rate and provided in the Act:

> "Any railroad company, or any officer, agent or representative thereof, who shall violate any provision of this Act shall be guilty of a felony, and, upon conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment in the State Prison for a period not exceeding five years, or both such fine and imprisonment."

In that case the violation was nothing less than a felony with a penalty not exceeding five years in State Prison; whereas, the penalty for violation of the Montana statute is not exceeding six months in the county jail. Again, the fine in the *Young Case* was not exceeding $5,000, while in the Montana case it is not to exceed $1,000. Undoubtedly the Minnesota statute considered in the *Young Case* was most drastic and severe and cannot be compared with the penalty under the Montana statute.

In *Rast v. Van Deman and Lewis*, 240 U. S. 342, this

Court held that a Florida statute which fixed a penalty not exceeding $1,000 or by imprisonment in the county jail not exceeding six months, which, it will be noted, is the same as ours, as not excessive. The court distinguished this case from the case of *Ex parte Young*, supra.

It is stated in 12 C. J. p. 1177, Section 927, that the states possess a large measure of discretion in fixing the amounts of such penalties and that such statutes will not be declared void where the amounts are not clearly excessive or unreasonable. We call attention to the following cases cited in the footnote (32):

Rail, etc., Coal Co. v. Yaple, 236 U. S. 338, 35 Sup. Ct. 359, 59 L. Ed. 607;
Portland R., etc., Co. v. Portland, 210 Fed. 667;
Oregon R., etc., Nav. Co. v. Campbell, 173 Fed. 957;
Chicago, etc., R. Co. v. Davis, 114 Ark. 519, 170 S. W. 245;
State v. Oregon, etc., Co., 68 Wash. 160, 123 Pac. 3.

In the case of *Rail etc., Coal Co. v. Ohio Industrial Commission*, supra, this court held that an Ohio statute fixing the penalty as a misdemeanor and the fine not less than $300 nor more than $600, as not excessive. The penalty imposed by the Montana statute cannot be considered so excessive and unreasonable as to deny the appellee the equal protection of the laws.

IV

DUE PROCESS OF LAW

It is asserted that the statute deprives the Telephone Company of its property without due process of law for the reason that it is not permitted to deduct the tax as an operating expense.

As before stated, there is nothing in the second act to prevent appellee from deducting the payment of this tax as an operating expense. The appellee is merely prevented from setting it up as a separate item in the bill, statement or account rendered to its customers.

If the provision in the first act deprives the appellee of that right and it should be held void and unconstitutional for that reason, the rest of the act should not be affected thereby. (See I, D. supra). Furthermore, the appellee cannot be hurt in the absence of a showing that it has applied to the Public Service Commission of Montana for an increase in its rates which, no doubt, would be allowed if justified and the said provision is void. No proof has been made that because of the amount of the tax it is confiscatory.

V

SPECIFIC APPROPRIATIONS

Appellee contends that the act is unconstitutional and void in that it directs the treasurer to pay moneys out of the state treasury without specific appropriation having been made, and further because the amount credited to the Emergency Relief Fund, is not specified. It is claimed that this constitutes a violation of Section 10, Article XII, of the Montana Constitution, which provides:

> "All taxes levied for state purposes shall be paid into the state treasury, and no money shall be drawn from the treasury but in pursuance of specific appropriations made by law."

It will be noted that the Constitution does not require that the appropriation be specific in so many dollars and cents. The general rule with reference to appropriations

is set forth by the textwriter in 59 C. J. p. 250:

> "Effect when amount is ascertainable. Even where a specification of the amount is required, it is not essential or vital to an appropriation that it should be for an amount definitely ascertained prior to the appropriation; and an appropriation, the amount of which will be made certain by a mere mathematical computation, if the provisions of the act are carried into effect, sufficiently complies with this requirement. Where such a requirement is recognized, if there is no constitutional provision requiring the fixing of a maximum in dollars and cents, an appropriation may be valid when its amount is to be ascertained in the future from the collection of the revenue; * * *."

The Montana Supreme Court gave consideration to the question in *State v. State Board of Examiners*, 74 Mont. 1, 238 Pac. 315. In that case it was claimed that the act was contrary to the said section of the Constitution because the rate of interest was not specified in the appropriation. The appropriation was held sufficient. The court speaking by Mr. Justice Matthews, said, on page 10:

> "However, by the provisions of the Act in question, our legislative assembly exercised that power; the amount of principal is definite; and, when the treasury notes are sold, the rate of interest will be fixed within the maximum provided in the Act. Nothing is left then to the executive officers but a mathematical calculation. The rule that 'that is certain which can be made certain' applies to appropriations. (*Town of Highgate v. State*, 59 Vt. 39, 7 Atl. 898; *State ex rel. Farrar v. Hipple*, 7 S. D. 234, 64 N. W. 120; *State ex rel. Ledwith v. Searle*, 79 Neb. 111, 112 N. W. 380; *Norcross v. Cole*, 44 Nev. 88, 169 Pac. 877; *Holmes v. Olcott*, 96 Or. 33, 189 Pac. 202.) * * *
>
> "In *People v. Miner*, 46 Ill. 384, the court said: 'It is not essential or vital to an appropriation that

> it should be of an amount certainly ascertained prior to the appropriation. There is no requirement of that kind in the Constitution.'
>
> "Inasmuch as the exact amount of the appropriation will be made certain merely by mathematical computation, if the provisions of the Act are carried into effect, this Act sufficiently complies with this provision of the Constitution."

The amount of the appropriation in the case at issue can be determined by a simple mathematical calculation, to-wit: The number of the telephones for which a certain monthly rate is paid for local use. This, of course, could not be and need not be calculated prior to the making of the appropriation. This sum, to be determined by such mathematical calculation, is specifically appropriated, 5% for administration and 95% for Emergency Relief until such time as the Governor shall determine that such relief is no longer necessary, and thereafter to the General Fund of the State. If an appropriation such as this can not be legally made it would be impossible for the legislature to express its will or for governments to function. There is nothing in the *Pomeroy Case*, 51 Mont. 119, 151 Pac. 333, cited below by appellee, which is contrary to the principles above stated. That case had to do with a different kind of situation. There was no appropriation at all. In that case the Montana Court was considering Section 7359 R. C. M. 1907. The court said:

> "In so far as Section 7359 above authorizes a judgment that the auditor draw his warrant *in the absence of an appropriation*, it is in direct conflict with the mandates of the Constitution and invalid." (p. 126—Italics supplied).

VI

DELEGATION OF LEGISLATIVE POWER TO THE GOVERNOR

It is claimed further that the statute is unconstitutional for the reason that there was an attempt to delegate legislative power to the Governor by reason of the provision in Section 4 of the Act, which provides:

> "The remaining 95% thereof shall be by him (state treasurer) credited to the Emergency Relief Fund until such time as the Governor may issue a proclamation to the effect that the same is no longer required for such emergency relief fund, and after the issuance of such proclamation said 95% of such license fees shall be by such state treasurer credited to the General Fund of the state."

In other words, the legislature gave the Governor the power to determine the *fact* whether emergency relief is needed. How else can this fact be determined except by the legislature re-convening at much expense and if at a special session at the call of the Governor. Certainly, it is desirable that someone have the power to find that fact, so that the revenue for relief purposes may cease when no longer needed and it be thereafter placed in the General Fund.

The principle was well expressed in *Field v. Clark*, 143 U. S. 649, 694. In that case authority was conferred upon the President to reduce the revenue and equalize duties on imports and to suspend by proclamation the free introduction of certain commodities, when he was satisfied that any country producing such articles imposed duties or other exactions upon the agricultural or other products of the United States, which he deemed to be reciprocally

unequal or unreasonable. It was there held that the act in question was not open to the objection that it unconstitutionally transferred legislative power to the President. The court in that case said:

> "Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed.
>
> " 'The true distinction,' as Judge Ranney speaking for the Supreme Court of Ohio has well said, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' *Cincinnati, Wilmington etc. Railroad v. Commissioners,* 1 Ohio St. 88. In *Moers v. City of Reading,* 21 Penn. St. 188, 202, the language of the court was: 'Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law.' So, in *Locke's Appeal,* 72 Penn. St. 491, 498: 'To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state

of affairs not yet developed, or to things future and impossible to fully know.' The proper distinction the court said was this: *'The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.* To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation." (Italics supplied).

The same question was again considered in the following cases:

Union Bridge Co. v. U. S., 204 U. S. 364, 377 (where the cases are reviewed);
U. S. v. Grimaud, 220 U. S. 506 (additional cases are cited and reviewed);
Hampton & Co. v. U. S., 276 U. S. 394, 405 (where cases are cited and reviewed);
Buttfield v. Stranahan, 192 U. S. 470;
In re Kollock, 165 U. S. 526;
Oceanic Navigation Co. v. Stranahan, 214 U. S. 320;
Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 214;
State v. Chicago etc., Ry. Co., 38 Minn. 281, 298, 302; 134 U. S. 418, 459, 461, 464;
State v. Board of Examiners, 74 Mont. 1, 238 Pac. 316;
State v. Johnson, 75 Mont. 240, 243 Pac. 1073;
Chicago etc., Ry. Co. v. Board of Railroad Commissioners, 76 Mont. 305, 247 Pac. 162;
State v. Asal, 79 Mont. 385, 256 Pac. 1071;
Northern Pacific Ry. Co. v. Bennett, 83 Mont. 483, 272 Pac. 987.

See also cases collected in 12 C. J. 486, note 76.

In the Montana case above cited, *Chicago etc., Ry. Co. v. Board*, our Supreme Court adopted the reasoning of the

Supreme Court of the United States, see page 313 of 76 Montana Reports, where the court quoted from *U. S. v. Grimaud,* supra; *Union Bridge Co. v. U. S.,* supra, and other cases.

VII

DUTY AND PRIVILEGE

It is next claimed that the operation of the company's telephone system in Montana is not a privilege but a duty and for that reason the domestic business of the company cannot be taxed. There can be no doubt but that the company under its permissive charter (Section 14, Article XV, Montana Constitution) has obtained from the State of Montana the privilege of building a telephone system and making a charge upon the subscribers and residents of Montana for its use but having acquired that privilege, the company owes a duty as long as it chooses to occupy the field and to operate that system, to serve the people in the territory which it professes to serve. The answer of the appellants, paragraph XII, (R. 16) specifically denies that the maintenance and operation of the telephone system is not a privilege and denies that the maintenance and operation thereof is a duty and obligation imposed upon appellee. Appellants have admitted, however, that when appellee has been granted the privilege of operating a telephone system as long as it chooses to carry on and profit by that privilege, it must discharge its duty of serving the public which it in effect promised to do when it accepted the privilege. The duty accompanies the privilege. If the Telephone Company wishes to withdraw from the field of rendering local telephone

service, there is no law to prevent it and we do not understand that appellee has attempted to cite authority to the effect that it cannot withdraw and surrender that privilege. Appellee is not bound by any contract, statute or constitution to perpetually engage, at a loss, in local telephone business in Montana.

> See *City of Helena v. Helena Light & Ry. Co.*, 63 Mont. 108, 207 Pac. 337;
> *State v. Helena P. & L. Co.*, 22 Mont. 391.

In the latter case the court said:

> "We see no good reason why corporations may not discontinue their enterprises when the charter does not in express terms, or by fair implication, forbid it."

The privilege of engaging in the telephone business in Montana, is a valuable one. The benefits and profits resulting therefrom are no doubt enormous. To assert that the company may enjoy all of this and at the same time to say that the company cannot be taxed like other persons and corporations because that which was once a privilege is now no more than a duty and a burden, is certainly an astonishing argument, to say the least. We find nothing in the case of *Russell v. Sebastian*, 233 U. S. 195, (cited below) contra.

Appellee argued further that since the Constitution gives the company the right to carry on a telephone business in the state the license tax is an infringement and imposition upon that right and amounts to a denial thereof. The statement carries its own refutation. No cases were cited in support of this startling doctrine. Neither the appellee nor any other public service corporation has acquired a right to immunity from taxation. (See Sec-

tion 7, Article XII, Montana Constitution).

On the question of the right of a state to tax the intrastate business of a corporation, see the cases cited under I herein.

As for the taxes being confiscatory, no proof was offered to that effect. Appellee has not chosen to make an issue of fact upon the question of the reasonableness of the tax as compared to its earnings and the rates charged to subscribers. There is nothing to prevent the company from presenting this question to the Public Service Commission. The right to tax cannot be denied because the power may be abused. If the operation of a telephone system is not a privilege but only a duty and a burden upon appellee which it cannot lay down, an argument that it should be given a bonus would seem to be the next logical step.

VIII

A SPECIAL LAW FOR THE ASSESSMENT OR COLLECTION OF TAXES

Appellee contends that the statute is a special law for the assessment or collection of taxes in violation of Article V, Section 26, of the Montana Constitution. We are aware of no cases where a statute like the one we are considering has been held to be a special law and therefore void. The law operates throughout the state and upon every person, firm, co-partnership, association, joint stock company, syndicate and corporation within the given classification, that is, upon those who charge certain monthly rates for local use of the telephone. Since the statute is general in scope and operates upon all within

a given class, it is not a special law.

Hart Refineries v. Harmon, 81 Mont. 423, 263 Pac. 687;

State ex rel. Federal Land Bank v. Hayes, 86 Mont. 58, 282 Pac. 32;

State ex rel. Redman v. Meyers, 65 Mont. 124, 210 Pac. 1064;

Trumper et al. v. School District, 55 Mont. 90, 173 Pac. 946;

59 *C. J.* 729 and cases cited in notes 41 and 64.

"The test of whether a statute falls within the constitutional limitations and inhibitions upon the right to enact special or local legislation becomes, ordinarily, the propriety of the classification resorted to by the legislature."

59 C. J. 732, Section 319, note 80.

That the classification under the statute is not unreasonable and arbitrary, has been considered under III herein. We respectfully call attention to the cases cited under that heading.

There is no evidence in this case that the appellee is the only telephone company which is affected by this Act. So far as the pleadings and the records show, there may be many more. But even if it is the only one, if the classification is a proper one and not unreasonable or arbitrary, we are not aware of any case which would render the law a special one for that reason. The exemptions or exceptions are no more arbitrary or unreasonable than are the exemptions under the various income tax laws.

IX

POWER OF THE STATE TO FURNISH RELIEF

It is claimed that the Act is unconstitutional because it violates Section 5, Article X, of the Montana Constitution, which provides:

> "The several counties of the state shall provide as may be prescribed by law for those inhabitants, who, by reason of age, infirmity or misfortune, may have claims upon the sympathy and aid of society."

By this provision of the Constitution, a duty and responsibility is cast upon the counties of the state. No limitation, however, was placed upon the legislature. The State Constitution is not a grant of power but a limitation upon the powers of the legislature.

In *State v. State Board of Equalization,* 56 Mont. 413, 185 Pac. 708, the Supreme Court of Montana said:

> "The maxim expressio unius est exclusio alterius, invoked by respondents, is a rule of interpretation, and not a constitutional command, and cannot be made to serve as a means to restrict the plenary power of the legislature, nor to control an express provision of the Constitution." (443).

In *Missouri River Power Co. v. Steele,* 32 Mont. 433, 80 Pac. 1093, the court said:

> "In the matter of legislation the people, through the legislature, have plenary power, except in so far as inhibited by the Constitution, and the person who denies the authority in any given instance must be able to point out distinctly the particular provision of the Constitution which limits or prohibits the power exercised." (438).

See also *Hilger v. Moore,* 56 Mont. 146, 182 Pac. 477;
In re Pomeroy, 51 Mont. 119, 151 Pac. 333;

O'Connell v. State Board of Equalization, 95 Mont. 1, 25 Pac. (2d) 114, and cases cited on page 117;
State ex rel. Evans v. Stewart, 53 Mont. 18, 161 Pac. 309;
Great Northern Utility Co. v. Public Service Commission, 88 Mont. 180, 293 Pac. 294.

That the State of Montana is now and for some time past, has been in a state of emergency is a matter of common knowledge of which the court will take judicial notice.

State v. Russell, 84 Mont. 61, 246 Pac. 148;
McNair v. School District, 87 Mont. 423, 288 Pac. 188;
City etc., v. Collins, 216 Cal. 187, 13 Pac. (2d) 912;
State ex rel. Hamilton v. Martin, 173 Wash. 249, 23 Pac. (2d) 1;
Lonabaugh v. Lonabaugh, 46 Wyo. 23, 22 Pac. (2d) 199;
State v. Industrial Commission, 207 Wis. 652, 242 N. W. 321.

Both the Governor and the legislature have solemnly declared the situation in detail. We call attention to the Governor's Messages and to Chapters 43, 44 and 46, Laws of 1933, and to Chapters 20, 24, 40, 41, 46, 48, 51, 52, 54, 55, 56 and 57 of the Extraordinary Session Laws of 1933-34. During the period following the fall of 1929, called "the depression," and accompanied in Montana by drought conditions for several seasons, an extraordinary number of the state's inhabitants have been unemployed. Starvation has confronted tens of thousands in the state; many property owners, if not a majority of them, have been unable to pay their taxes; county poor funds have been exhausted and county relief systems have been wholly in-

adequate to meet the emergency. The Federal Government has found it necessary to rush millions into the state for relief. With the county relief agencies taxed beyond their power and with the state prostrate, can it be said that the state can do nothing and must look on helplessly while its people die? Are the sovereign people of the State of Montana denied the right of self-preservation, which is the first law of nature, as well as of government?

If the power to maintain itself does not exist and all has been bestowed upon the counties so that none remains in the state in cases of state-wide calamity or emergency, then the power must nevertheless reside in that vast body of power known as the police power. We call attention to the following cases:

Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E 938, Ann. Cas. 1918A 1024;

Black v. Hirsh, 256 U. S. 135, 41 Sup. Ct. 458, 460, 65 L. Ed. 865, 16 L. R. A. 165;

Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 41 Sup. Ct. 465, 65 L. Ed. 877;

Levy Leasing Co. v. Siegel, 258 U. S. 242, 42 Sup. Ct. 289, 66 L. Ed. 595;

Chastleton Corporation v. Sinclair, 264 U. S. 543, 44 Sup. Ct. 405, 406, 68 L. Ed. 841;

Home Loan Building & Loan Association v. Blaisdell, 290 U. S. 398;

Walker v. Bedford, 93 Colo. 400, 26 Pac. (2d) 1051, (dissenting opinions);

Hamilton v. Martin, 173 Wash. 249, 23 Pac. (2d) 1;

Commonwealth v. Liveright, 308 Pa. 35, 161 Atl. 697;

Jennings v. City of St. Louis, 332 Mo. 173, 58 S. W. (2d) 979, 87 A. L. R. 365.

Regardless of the emergency relief, it is evident that the legislature would have enacted the law anyway for revenue purposes. This purpose is evidenced by the fact that after the emergency has passed, all revenue shall go to the General Fund.

Dill v. People, 94 Colo. 230, 29 Pac. (2d) 1035;
State v. Silver Bow Refining Co., 78 Mont. 1, 252 Pac. 301;
59 *C. J.* 855, where it was said:

> "It has very generally been held that where a statute is unconstitutional in part only, it may be amended by striking out invalidating provisions or supplying others to make it conform to constitutional requirements."

X

LICENSE TAX FOR REVENUE

In Montana there can be no question of the right of the legislature to impose a license tax for revenue purposes upon the intrastate business of the appellee. Article XII, Section 1, of the Montana Constitution provides:

> "* * * The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in the state."

See also:

State v. Camp Sing, 18 Mont. 128, 56 Am. St. Rep. 551, 32 L. R. A. 635, 44 Pac. 516;
Northwestern Mutual Life Ins. Co. v. Lewis and Clark County, 28 Mont. 484, 98 Am. St. Rep. 572, 72 Pac. 982;
State v. Hammond Packing Co., 45 Mont. 343, 123 Pac. 407; Id., 233 U. S. 331, 58 L. Ed. 985, 34 Sup. Ct. Rep. 596;
Equitable Life Assur. Co. v. Hart, 55 Mont. 76, 183 Pac. 1062.

XI

REASONABLENESS OF THE TAX

Although the charge is made in the bill of complaint that the statute is unconstitutional because of the amount of the exaction therein imposed, no proof was made that the amount of the tax is arbitrary, unreasonable and oppressive. Furthermore, if the amount of the tax is more than can be borne under the existing rates, a remedy lies before the Public Service Commission of Montana, to which it does not appear that any application has been made.

XII

CONSTRUCTION OF STATUTES

This court has said that every act is to be construed so as to maintain its constitutionality, if possible. (*New York Central R. R. v. United States,* 212 U. S. 481). Every reasonable presumption will be made in favor of the validity of the statute. These principles are so well settled that no citation of authorities is necessary. For collection of cases, see 12 C. J. 787 et seq., and notes. In *State ex rel. Bonner v. Dixon,* 59 Mont. 58, 195 Pac. 841, it was said:

> "The law is settled that the constitutionality of a legislative enactment is prima facie presumed, and every intendment is in favor of upholding it, unless it appears unconstitutional beyond a reasonable doubt." (Citing many cases).

Where no federal question is involved, the courts of the United States will adopt and follow the decisions of the state courts in construing their own constitutions and

laws. (12 C. J. 698, Section 37). For list of cases decided by this court, see footnote 52.

For the reasons urged, we respectfully submit that the Decree of the District Court, granting a permanent injunction, should be reversed, with directions that such injunction be dissolved.

Respectfully submitted,

RAYMOND T. NAGLE,
Attorney General.

ENOR K. MATSON,
Assistant Attorney General.
Solicitors for Appellants.

APPENDIX

CHAPTER 174, LAWS OF MONTANA, 1933, TWENTY-THIRD SESSION

An Act Requiring Every Person, Firm, Copartnership, Association, Joint Stock Company, Syndicate and Corporation Engaged in or Carrying on the Business of Constructing, Maintaining and Operating Telephone Lines and Telephone Instruments Within the State of Montana to Pay License Taxes and Providing Penalties.

Be it enacted by the Legislative Assembly of the State of Montana:

Section 1. Every person, firm, copartnership, association, joint stock company, syndicate and corporation engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana, whether as owner, lessee, trustee or receiver or in any other capacity, shall pay in to the State Treasurer on or before the first day of January each year a license tax in the amounts following for each telephone instrument used, controlled and operated by it in the conduct of such business, based upon the number of telephone instruments owned, controlled and operated by it during all or any part of the calendar year, to-wit: On the first twenty (20) telephone instruments or less a license tax of Ten Cents (10c) per phone; from twenty (20) to seventy-five (75) such instruments a license tax of Twenty Cents (20c) per phone, and on all above seventy-five (75) a license tax of One Dollar ($1.00) for each such instrument. The license tax so paid shall in no manner effect (affect) the rates charged to the patrons and users of such telephone instruments, but shall be borne entirely by the owning and operating concern. Provided, the tax herein provided for shall not be imposed on any telephone instrument where the rate charged the customer therefor does not exceed Two Dollars ($2.00) per month for residence phone, or Three Dollars ($3.00) per month for business house or office phone.

Section 2. A telephone instrument is hereby defined to be a transmitter and receiver capable of use in the transmitting and receiving of telephone communications.

Section 3. Any violation of any of the provisions of this Act shall be deemed a misdemeanor and shall be punished by fine of not more than One Thousand Dollars ($1000) or by imprisonment in the county jail not exceeding six (6) months, or by both such fine and imprisonment.

Section 4. All license fees paid to the State Treasurer under the provisions of this Act shall be by him, before the end of each fiscal year, divided by the counties in this state according to the number of telephone instruments in use from time to time in the respective counties of the state and on each such computation and division the State Treasurer shall transmit the share of each county to the County Treasurer thereof, for the use and benefit of the county general fund.

Section 5. This Act shall be in full force and effect from and after its passage and approval.

Approved March 16, 1933.

CHAPTER 54, LAWS OF MONTANA, 1933-34, TWENTY-THIRD EXTRAORDINARY SESSION

An Act Amending Section 1, and Section 4, of Chapter 174, of the Session Laws of 1933, Requiring Every Person, Firm, Co-Partnership, Association, Joint Stock Company, Syndicate and Corporation Engaged in or Carrying on the Business of Constructing, Maintaining and Operating Telephone Lines and Telephone Instruments Within the State of Montana, to Pay License Taxes and Providing Penalties.

Be it enacted by the Legislative Assembly of the State of Montana:

Section 1. That Section 1, of Chapter 174, of the Session Laws of 1933, be amended to read as follows:

"Section 1. Every person, firm, co-partnership, association, joint stock company, syndicate and corporation engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana, whether as owner, lessee, trustee or receiver or in any other capacity, shall pay in to the State Treasurer on or before the first day of March each year a license tax in the amounts following for each telephone instrument used, controlled and operated by it in the conduct of such business:

A license tax of Two Dollars ($2.00) for each such instrument.

No bill, statement or account rendered or given any customer by any telephone company shall set out or contain, as a separate item, any amount on account or by reason of the license tax imposed by this Act. Every person, firm, co-partnership, association, joint stock company, syndicate or any corporation affected by the provisions of this Act shall be permitted to claim as exempt from the tax imposed by this Act any telephone instrument where the rate charged the customer therefor does not exceed Two Dollars ($2.00) per month for residence phone, or Four Dollars ($4.00) per month for business house or office phone. Provided further, that the provisions of this Act shall not apply to mutual telephone companies or lines not organized or used or operated for private or corporate gain."

Section 2. That Section 4, of Chapter 174, of the Session Laws of 1933, be amended to read as follows:

"Section 4. Five per centum (5%) of the license fees paid to the State Treasurer under this Act are hereby appropriated and shall be set aside by him for the purpose of defraying the cost of administering this Act by the State Board of Equalization, and the remaining ninety-five per centum (95%) thereof shall be by him credited to the Emergency Relief Fund until such time as the Governor may issue a proclamation to the effect that the same is no longer required for such Emergency Relief Fund, and after the issuance of such proclamation

said ninety-five per centum (95%) of such license fees shall be by such State Treasurer credited to the General Fund of the state."

Section 3. No tax which has attached, accrued, or become due or payable under the provisions of Chapter 174, Session Laws, 1933, shall be released or waived by the passage or approval of this Act but the same shall be paid as provided in said chapter before its amendment by this Act.

Section 4. This Act shall be in full force and effect from and after its passage and approval.

Approved January 20, 1934.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 423

FRANK H. COONEY, as Governor of the State of Montana;

RAYMOND T. NAGLE, as Attorney General of the State of Montana; and

JAMES J. BRETT, as Treasurer of the State of Montana,

Appellants,

v.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Appellee.

Brief of Appellee

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 423

FRANK H. COONEY, as Governor of the State of Montana;

RAYMOND T. NAGLE, as Attorney General of the State of Montana; and

JAMES J. BRETT, as Treasurer of the State of Montana,

Appellants,

v.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Appellee.

Brief of Appellee

STATEMENT OF THE CASE

The case is before this court on appeal from the District Court of the United States for the State of Montana. That court, specially constituted, as required in such cases by Section 266 of the Judicial Code, heard the case on ap-

plication for temporary injunction, and by stipulation of the parties it was submitted for final decision and decree, and a permanent injunction was granted. By the judgment the appellants here were enjoined from enforcing, or attempting to enforce, two acts of the Legislature of the State of Montana, copies of which are set out in full as an appendix to this brief.

The original act, Chapter 174 of the Session Laws of Montana, 1933, as indicated by the title, requires all persons and corporations "*engaged in or carrying on the business of constructing, maintaining and operating telephone lines and telephone instruments* within the State of Montana to pay *license taxes.*" Section 1 of the act provides that all such persons and corporations "*engaged in the business of operating or maintaining telephone lines and furnishing telephone service* in the State of Montana," shall pay to the State Treasurer on or before the first day of January each year *a license tax* in the amounts following "for each *telephone instrument* used, controlled and operated by it in the conduct of such business, based upon the number of telephone instruments owned, controlled and operated by it during all, or any part of the calendar year, to-wit: *On the* first twenty (20) *telephone instruments* or less a *license tax* of Ten Cents (10c) per phone; from twenty (20) to seventy-five (75) *such instruments* a *license tax* of Twenty Cents (20c) *per phone*, and on all above seventy-five (75) a *license tax* of One Dollar ($1.00) for *each such instrument.*"

It is then provided: "The *license tax* so paid shall in no manner affect the rates charged to the patrons and users of such *telephone instruments*, but shall be borne entirely by the owning and operating concern."

Then follows a proviso that the tax provided for "shall

not be *imposed on any telephone instrument*" where the rate charged the customer does not exceed $2.00 per month for residence telephones, and $3.00 per month for business telephones.

This act provided that a violation thereof should be a misdemeanor, and punished by a fine of not more than $1,000.00, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment. It is then provided that all such license fees paid to the State Treasurer shall be divided by him as between the counties of the state, according to the number of telephone instruments in use from time to time in the several counties.

Effective January 20, 1934, this act was amended so as to require such persons and corporations "*engaged in the business of operating or maintaining telephone lines and furnishing telephone service* in the State of Montana" to pay to the State Treasurer on or before the first day of March of each year "*a license tax* in the amounts following *for each telephone instrument used, controlled and operated by it* in the conduct of such business: A *license tax* of Two Dollars ($2.00) for *each such instrument.*" It is then provided that no bill, statement or account rendered or given to any customer shall set out or contain, as a separate item, any amount on account of or by reason of the license tax imposed. It is then provided that all such persons and corporations affected by the act shall be permitted to claim as *exempt* from the tax "*any telephone instrument*" where the rate charged the customer does not exceed $2.00 per month for residence telephones, and $4.00 per month for business telephones. It is then provided that the act shall not apply to mutual telephone companies, or lines not organized, used or operated for gain. It is then provided that five per cent of such license fees so paid to the State

Treasurer is appropriated for the purpose of defraying the cost of administering the act, and 95 per cent thereof is required to be credited to the Emergency Relief Fund until such time as the Governor shall issue a proclamation to the effect that the same is no longer required for such fund, after which the 95 per cent is required to be credited to the General Fund of the State. It is then provided that any tax which had accrued, or become payable, under the original act, should not be released or waived by the passage of the amendment, but that the same should be paid as required by the original act. (Italics in both statutes ours.)

Accordingly, two license taxes were required to be paid in the year 1934—one on January 1st under the original act, and the other on March 1st under the act as amended.

The case made by the bill of complaint and answer, and by the undisputed evidence, may be briefly stated as follows: The appellee is a subsidiary of the American Telephone and Telegraph Company, and is engaged in rendering telephone service throughout the States of Montana, Idaho, Utah, Wyoming, Colorado, Arizona, New Mexico, and part of Texas, providing local exchange telephone service, and intrastate and interstate long distance toll service; also, through connecting agreements with the American Telephone and Telegraph Company, and other telephone companies, it affords instrumentalities and facilities for direct telephone communication between its subscribers and the public of Montana, and its subscribers and the public of the other states in which it operates, and telephone subscribers and the public throughout the United States and foreign countries. There are approximately 16,600,000 telephones in the United States, and over 30,000,000 in the entire world, and it is possible for the subscribers of the appellee and the public in the State of Montana to

communicate with persons using practically all of these telephones (R. 25, 35).

The appellee has in service over 34,000 telephone instruments in the State of Montana, for which a rate is charged of more than $2.00 per month for residence telephones, and more than $3.00 per month for business telephones; and approximately 29,000 telephone instruments in use in Montana, for which a rate is charged of more than $2.00 per month for residence telephones, and more than $4.00 per month for business telephones (R. 33). This separation was made because of the variation between the original act and the amendment, as to the charge for the business telephones. Between March 16, 1933 and January 1, 1934, the appellee was able to determine that more than 10,000 of these telephone instruments in Montana were actually used for interstate communication, and between January 1, 1934 and March 20, 1934, 2108 additional telephones were used in interstate communication (R. 34). The check on this matter had to be limited to the period of time after the original act became effective, and this check did not include all interstate calls originating in states other than Montana and foreign countries, and terminating in Montana (R. 34). In addition to this, it was shown that arrangements are made with the Western Union and Postal Telegraph Companies, whereby any person can originate at any telephone in the State of Montana, belonging to the appellee, and affected by the acts under consideration, a telegram, cablegram, or radiogram, to any point served by these telegraph companies. Likewise, telegrams originating with the telegraph companies anywhere may be delivered to subscribers of the appellee in Montana over their telephones. These telegraph companies operate throughout the United States, and are engaged in sending

interstate messages, as well as intrastate messages (R. 35).

There are sixty-four telephone companies engaged in business in Montana. Fifty of these companies charge rates not to exceed $2.00 for residence telephones, and $4.00 for business telephones. Only fourteen of these companies are in any way affected by the acts under consideration (R. 36).

It would not be possible to operate separately the interstate and the intrastate business of the company. The same telephone instruments, the same signalling apparatus, and the same poles, wires and cables are used in common for both classes of service. It would require 100 per cent duplication of outside distributing plant and telephones, and a large duplication of central office equipment. The attendant expense of such disconnected operation would substantially destroy all telephone service as it is known today, and prices would be prohibitive (R. 39).

In addition to the 12,108 telephones known to have been used since March 16, 1933 in making interstate calls, approximately 800 additional telephones would be so used each month. Accordingly, it is only a question of time until practically every telephone instrument in the State of Montana will have been used in interstate commerce (R. 39). As 100 per cent is approached, of course the curve ("Plaintiff's Ex. 2" R. 40 A) flattens out, because there will be some instruments not used in interstate commerce, but eventually practically all will be so used (R. 40).

In addition to calls originating in the State of Montana, there are many interstate calls terminating in Montana; that is, the appellee's subscribers in Montana will be called from points outside of the state, and in such cases, the matter is not controlled by the will of the subscribers in Montana, but is entirely dependent upon the will of telephone

subscribers and the public who may desire to make interstate calls to points in Montana (R. 41). Thus each and all of the telephone instruments affected by these acts are instrumentalities of interstate commerce, entirely without regard to the will of the subscribers in Montana.

The first interstate line in Montana was opened for public use September 3, 1899. At the present time, the appellee has eighty-four interstate lines (R. 37). This is shown on the map marked "Plaintiff's Exhibit 1," and attached to page 38 of the record.

The testimony produced by appellee was wholly uncontradicted, and the District Court made definite and specific findings of fact, as required by Equity Rule 70½ (R. 24). We summarize the findings of fact: Paragraph 5 of the Findings sets forth the operations of the appellee, in line with the testimony to which we have already referred, and ends with this language:

> "That of these telephones in Montana over 34,000 are affected by this statute, and of these 34,000, more than 10,000 have actually been used in interstate and foreign commerce since the statute in question was enacted, and in due time it is reasonably likely that all telephone instruments maintained and operated by the plaintiff in the state, as a part of this system, will be so used in interstate and foreign commerce." (R. 25)

In Paragraph 6, the court found:

> "*That the plaintiff pays the usual property taxes in Montana and also pays the corporation license, or occupation taxes, which are a percentage of its intrastate revenues.*" (R. 25)

In Paragraph 9, the court found:

> "That *all of said telephones* constituting a part of said system in Montana *are instrumentalities of interstate and foreign commerce*, and plaintiff could not

discontinue its intrastate business and operations in Montana without virtually destroying and being compelled to abandon and withdraw from its interstate and foreign business." (R. 25-26). (Italics ours).

The appellants assign error in this court upon the findings of fact to which we have just referred, on the basis that there is no sufficient evidence to support such findings.

The opinion of the court is reported in 7 *Fed. Sup.* 12.

SUMMARY OF ARGUMENT

I.

THE ACTS INTERFERE WITH AND IMPOSE A BURDEN UPON INTERSTATE COMMERCE, IN VIOLATION OF THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

(a) *This court has uniformly held that a state may not impose any license or excise tax upon the privilege of engaging in interstate commerce, or upon any of the instrumentalities used in interstate commerce, or for the privilege of using instrumentalities in such commerce.*

Pickard v. Pullman Southern Car Co.,
117 U. S. 34.
Barrett as President of the Adams Express Co. v. City of New York,
232 U. S. 14.
Bowman v. Continental Oil Co.,
256 U. S. 642.
New Jersey Bell Tel. Co. v. State Board of Taxes and Assessment,
280 U. S. 338.

(b) *As the telephone business has been developed with the common use of the telephone instruments, poles, wires, switchboards, and other instrumentalities in both*

intrastate and interstate commerce, the appellee could not discontinue the intrastate business in Montana without withdrawing also from the interstate business. For this reason, the acts are invalid, and violate the Commerce Clause of the Constitution of the United States.

Sprout v. South Bend,
277 U. S. 163.
East Ohio Gas Co. v. Tax Commission,
283 U. S. 465.
Constitution of Montana, Article XV, Sec. 14.
Hershfield v. Rocky Mountain Bell Tel. Co.,
12 Mont. 102, 116; 29 Pac. 883.
State ex rel. Rocky Mountain Bell Tel. Co. v. Mayor of Red Lodge,
30 Mont. 338, 340; 76 Pac. 758.
State ex rel. Crumb v. City of Helena,
34 Mont. 67, 71; 85 Pac. 744.
City of Butte v. Montana Independent Tel. Co.,
50 Mont. 574, 577; 148 Pac. 384.

(c) *The acts make no attempt to discriminate as between intrastate commerce and interstate commerce, and, indeed, it would be impossible to do so. The disavowal of the Attorney General of Montana of any intent to burden interstate commerce does not aid his case.*

State v. Northern Pacific Express Co.,
27 Mont. 419; 71 Pac. 404.
Bowman v. Continental Oil Co.,
256 U. S. 642.
New Jersey Bell. Tel. Co. v. State Board of Taxes and Assessment,
280 U. S. 338.
Western Union Telegraph Co. v. Kansas,
216 U. S. 1.

Cases cited and distinguished:

Osborne v. Florida,
164 U. S. 650.

Postal Telegraph-Cable Co. v. Charleston,
153 U. S. 692.
Postal Telegraph-Cable Co. v. City of Fremont,
255 U. S. 124.
Postal Telegraph-Cable Co. v. City of Richmond,
249 U. S. 252.
Keher v. Stewart,
197 U. S. 60.
Raley & Bros. v. Richardson,
264 U. S. 157.
Express Co. v. Seibert,
142 U. S. 339.

(d) *Some observations with respect to appellants' brief on the interstate commerce feature of the case.*

II.

THE ACTS DENY TO THE COMPANY THE EQUAL PROTECTION OF THE LAWS, GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

(a) *Because of the exceptions therefrom of telephone instruments as therein stated.*

Railroad Commission v. Cumberland Tel. & Tel. Co.
212 U. S. 414.
Pond on Public Utilities, 3rd Edition,
Sections 698 and 699.
Louis K. Liggett Co. v. Lee,
288 U. S. 517.
State Tax Commissioners v. Jackson,
283 U. S. 527.
Cotting v. Godard,
183 U. S. 79.
Louisville Gas & E. Co. v. Coleman,
277 U. S. 32.
Hale v. Treasurer of Mineral County,
82 Mont. 98; 265 Pac. 6.

Armour & Co. v. Virginia,
246 U. S. 1.
Citizens Tel. Co. v. Fuller,
229 U. S. 322.

(b) *The penalties imposed by the acts are so severe and excessive as to deny to the company the equal protection of the laws.*

Ex Parte Young,
209 U. S. 123.
Missouri Pacific Railway Co. v. Tucker,
230 U. S. 340.
State v. Crawford,
74 Wash. 248; 133 Pac. 390.

III.

THE ORIGINAL ACT CONSTITUTES A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW, CONTRARY TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT IT PROVIDED THAT THE LICENSE TAX SHOULD IN NO MANNER AFFECT THE RATES CHARGED THE PATRONS OF THE COMPANY, BUT SHOULD BE BORNE ENTIRELY BY THE COMPANY.

Galveston Electric Co. v. Galveston,
258 U. S. 387.
Consolidated Gas Co. of New York v. Newton,
267 Fed. 231.

IV.

THE ACTS IMPAIR THE OBLIGATION OF THE CONTRACT WITH APPELLEE, RESULTING FROM THE CONSTRUCTION OF A TELEPHONE SYS-

TEM IN MONTANA, PURSUANT TO THE RIGHT GRANTED BY SECTION 14, OF ARTICLE XV, OF THE MONTANA CONSTITUTION.

Hershfield v. Rocky Mountain Bell Tel. Co.,
12 Mont. 102; 29 Pac. 883.
Russell v. Sebastian,
233 U. S. 195.
In re Weston,
28 Mont. 207; 72 Pac. 512.
State v. Helena W. W. Co., et al.,
43 Mont. 169; 115 Pac. 200.
Johnson v. City of Great Falls, et al.,
38 Mont. 369; 99 Pac. 1059.
State v. City of Helena,
34 Mont. 67; 85 Pac. 744.
Butte v. Montana Independent Telephone Co.,
50 Mont. 574; 148 Pac. 384.
In re Johnson,
137 Calif. 110; 69 Pac. 971.
Town of Suisun City v. Pacific Gas & Elec. Co.,
35 Cal. App. 380; 170 Pac. 1078.
City of Oakland v. Great Western Power Co.,
186 Calif. 570; 200 Pac. 395.
Philadelphia & Reading R. R. Co. v. Pennsylvania,
15 Wall. 232.
Pickard v. Pullman Co.,
117 U. S. 34.
Leloup v. Port of Mobile,
127 U. S. 640.

V.

THE ACTS VIOLATE SECTION 10, OF ARTICLE XII, OF THE MONTANA CONSTITUTION, IN THAT THEY DIRECT THE TREASURER OF THE STATE OF MONTANA TO PAY MONEYS OUT OF THE TREASURY OF THE STATE WITHOUT SPECIFIC APPROPRIATIONS HAVING BEEN MADE THEREFOR BY LAW.

State v. State Board of Examiners,
74 Mont. 1; 238 Pac. 316.

VI.

THE ACT AS AMENDED VIOLATES THE MONTANA CONSTITUTION, BECAUSE THE AMOUNT THEREBY APPROPRIATED AND TO BE CREDITED TO THE EMERGENCY RELIEF FUND IS NOT SPECIFIED, AS REQUIRED BY SECTION 10, OF ARTICLE XII.

In re Pomeroy,
51 Mont. 119; 151 Pac. 333.
Peabody v. Russell,
302 Ill. 111; 134 N. E. 150.
Journal Publishing Co. v. Kenney,
9 Mont. 389; 24 Pac. 96.

VII.

THE ACTS ARE SPECIAL LAWS FOR THE ASSESSMENT OR COLLECTION OF TAXES, IN VIOLATION OF ARTICLE V, SECTION 26, OF THE MONTANA CONSTITUTION.

Ark-Ash Lumber Co. v. Pride and Fairley,
162 Ark. 235; 258 S. W. 335.
State v. Hays,
86 Mont. 58; 282 Pac. 32.
State v. Miksicek,
225 Mo. 561; 125 S. W. 507.
State ex rel. Wyatt v. Ashbrook,
154 Mo. 375; 55 S. W. 627; 48 L.R.A. 265.
Pedro v. Grootemaat,
174 Wis. 412; 183 N. W. 153.
State v. Baltimore & Ohio R. Co.,
113 Md. 179; 77 Atl. 433.

Board of Commissioners of Red River Bridge District v. Wood,
183 Ark. 1082; 40 S. W. (2d) 435.

VIII.

THE ACT AS AMENDED VIOLATES SECTION 5, OF ARTICLE X, OF THE MONTANA CONSTITUTION, WHICH PROVIDES THAT COUNTIES SHALL PROVIDE SUCH RELIEF AS IS CONTEMPLATED BY THE ACT, AND SUCH PROVISIONS OF THE CONSTITUTION ARE MANDATORY AND PROHIBITORY.

State v. Gowdy,
62 Mont. 119; 203 Pac. 1115.
Jones v. Cooney,
263 Pac. 429; 81 Mont. 340.
Walker v. Bedford,
93 Colo. 400; 26 Pac. (2d) 1051.
In re Weston,
28 Mont. 207; 72 Pac. 512.

IX.

THE ACT AS AMENDED DELEGATES LEGISLATIVE POWER TO THE GOVERNOR, CONTRARY TO SECTION 1, OF ARTICLE IV, OF THE MONTANA CONSTITUTION, IN THAT HE IS AUTHORIZED TO DETERMINE THE AMOUNT OF THE TAX TO BE CREDITED TO THE EMERGENCY RELIEF FUND AND DECLARE BY PROCLAMATION WHEN SAID MONEY SHALL NO LONGER BE REQUIRED FOR SAID PURPOSE.

4 Corpus Juris, and cases cited,
Pages 1457, 1458 and 1460.
Veto Case,
69 Mont. 325; 222 Pac. 428.

ARGUMENT

I.

THE ACTS INTERFERE WITH AND IMPOSE A BURDEN UPON INTERSTATE COMMERCE, IN VIOLATION OF THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

In the statement of the case, we have shown that the license tax is imposed against persons and corporations engaged in the business of operating and maintaining telephone lines and furnishing telephone service, in the State of Montana, and that the tax is specifically laid upon the use of telephone instruments; that the telephone lines and the telephone instruments are used in common for both intrastate and interstate commerce; that the telephone service furnished by appellee in Montana by means of the telephone lines and telephone instruments is of two kinds: first, local exchange and intrastate toll, and, second, toll service involving interstate and foreign commerce; also, that these telephone lines and telephone instruments are integral parts of a comprehensive telephone system used by appellee in the State of Montana rendering these two classes of service. The development of the telephone business, and the common use of these telephone lines and telephone instruments in both intrastate and interstate commerce are matters of such general knowledge that the courts will take judicial notice of them. But, in addition, the evidence is clear and uncontradicted, and the trial court found (R. 25):

> "That the telephone system owned and operated by the plaintiff extends throughout Montana, Idaho, Utah, Wyoming, Colorado, Arizona, New Mexico and a part of Texas, and the telephone instruments in Montana are an integral part of this system, and are a part

> of a great system extending throughout the United States and to a great many foreign countries, and each of these telephones (except 45 not affected by said statute) is available for interstate and foreign communication by connection with some 30,000,000 telephones throughout the entire system. * * * "

An analysis of the acts shows that they impose a burden upon interstate commerce, contrary to the Commerce Clause of the Constitution of the United States and the decisions of this court, in two ways: first, by requiring a license tax to be paid by persons or corporations engaged in the business of operating or maintaining telephone lines used in furnishing telephone service in the State of Montana, without making any distinction between intrastate and interstate and foreign service, and notwithstanding the fact that the telephone service so furnished is both intrastate and interstate in character, and is accomplished by operating and maintaining telephone lines used in common in furnishing both of these services; and, in the second place, by imposing the tax upon telephone instruments used, controlled and operated by the telephone company in the conduct of the business of operating and maintaining telephone lines, and furnishing telephone service, which instruments, together with the associated instrumentalities, are used in common in furnishing both intrastate and interstate and foreign service.

(a) *This court has uniformly held that a state may not impose any license or excise tax upon the privilege of engaging in interstate commerce, or upon any of the instrumentalities used in interstate commerce, or for the privilege of using instrumentalities in such commerce.*

We have already shown that the license tax in question is required to be paid by persons and corporations engaged in the business of operating and maintaining telephone

lines, and furnishing telephone service, in the State of Montana, and that the tax is specifically laid upon the use of telephone instruments; that the telephone lines and associated instrumentalities of appellee in Montana, and the telephone instruments, are used in common for both intrastate and interstate commerce. It is unnecessary to argue that a license tax can not be imposed upon the privilege of engaging in interstate commerce.

In the course of the decisions, this court has had occasion to pass upon various attempts by the states and municipalities to impose license or excise taxes directly upon interstate commerce, such as freight and passengers; also upon the use of the bill of lading employed in such commerce, and upon gross earnings derived from interstate commerce. In other cases, the court has had occasion to pass upon attempts to impose such taxes upon the privilege of engaging in interstate commerce, or upon instrumentalities used in common for both intrastate and interstate commerce, such as sleeping cars, express wagons, locomotives, and distributing stations where gasoline and oil are sold. All such attempts have failed. This latter class of cases, we submit, is determinative of the case at bar. No distinction can possibly be made between such facilities as sleeping cars, express wagons, locomotives, and distributing stations used in common for both intrastate and interstate commerce, and telephone lines and telephone instruments which are, under the development of the telephone business, designed for use, and are used in common for both intrastate and interstate commerce. Accordingly, we come directly to the decisions of this court, holding unconstitutional license or excise taxes imposed upon interstate commerce or upon instrumentalities, or upon the privilege of using instrumentalities, when employed in common for both intrastate and interstate commerce.

Pickard v. Pullman Southern Car Co.,
117 U. S. 34;
Barrett as President of the Adams Express Co. v. City of New York,
232 U. S. 14;
Bowman v. Continental Oil Co.,
256 U. S. 642;
New Jersey Bell Tel. Co. v. State Board of Taxes and Assessment,
280 U. S. 338.

In *Pickard v. Pullman Southern Car Co., supra*, the statute provided that the running and using of sleeping cars on railroads in Tennessee, not owned by the railroads upon which they were run or used, was a privilege, and that the company owning and running or using said cars should pay annually $50.00 for each and every such car so used and run over the railroads. The Pullman Company paid the tax, and brought suit to recover it. In this case, as in the case at bar, the tax was not a property tax, but was a tax for the privilege of using an instrumentality in interstate commerce. The court held the statute constituted a burden upon interstate commerce, and violated the Commerce Clause of the Constitution. The court said:

> "The tax was a unit, for the privilege of the transit of the passenger and all its accessories. No distinction was made in the tax between the right of transit, as a branch of commerce between the States, and the sleeping and other conveniences which appertained to a transit in the car. The tax was really one on the right of transit, though laid wholly on the owner of the car. So, too the service rendered to the passenger was a unit. The car was equally a vehicle of transit, as if it had been a car owned by the railroad company, and the special conveniences or comforts furnished to the passenger had been furnished by the railroad company itself. As such vehicle of transit, the car, so far as it

was engaged in interstate commerce, was not taxable by the State of Tennessee."

In *Barrett as President of the Adams Express Co. v. City of New York, supra*, an ordinance was involved which provided a license fee of $5.00 for each express wagon used as a public express, and it was provided that every vehicle "kept or used for the conveyance of baggage, packages, parcels, and other articles within or through the city of New York for pay" should be deemed a public express. The Adams Express Company brought suit to enjoin the enforcement of the ordinance. It was developed in that case that the express wagons used by the company were used both in connection with the company's local business in the city, and, in addition, in connection with the interstate business carried on by the company. The court held the ordinance void and in violation of the Commerce Clause. The court said:

> "But, if the above-mentioned sections are to be deemed to require that a license must be obtained as a condition precedent to conducting the interstate business of an express company, we are of the opinion that, so construed, they would be clearly unconstitutional."

The court then quoted from an earlier case the following:

> "A state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

In *Bowman v. Continental Oil Co., supra*, the statute of New Mexico imposed a license tax upon every distributor of gasoline, of $50.00 for each distributing station, or place of business, or agency. At the several distributing stations of the Continental Oil Company in New Mexico, the com-

pany transacted both local and interstate business. Approximately 94.5 per cent of the business transacted at these filling stations was intrastate, and approximately 5.5 per cent was interstate. The court said:

> "The subject taxed is not in its nature divisible, as in the case of the excise tax."

By the excise tax, the court had reference to a gasoline tax of two cents per gallon, which was in the statute denominated an excise tax. The court further said:

> "The imposition falls upon the entire business indiscriminately; and so does the prohibition against the further conduct of business without making the payment. By accepted canons of construction, the provisions of the act in respect of this tax are not capable of separation so as to confine them to domestic trade, leaving interstate commerce exempt." (Citing cases.)

It is interesting in this connection to note that the Attorney General, representing the State of New Mexico, argued that the act should be construed as affecting only intrastate commerce, and apparently other executive and administrative officials of the state had undertaken to construe the statute in that way. But the court said:

> "Its executive and administrative officials have disavowed a purpose to exact payment of the license tax for the privilege of carrying on interstate commerce. But the difficulty is that, since plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasolene indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce unless it be enforced otherwise than as prescribed by the statute,—that is to say, without authority of law. Hence, it cannot be enforced at all."

In *New Jersey Bell Tel. Co. v. State Board of Taxes and Assessment, supra*, a so-called franchise tax was imposed

by the statute of New Jersey against all persons and corporations occupying the highways, which the court in the opinion referred to as streets. The tax was based upon such proportion of the gross receipts of the company in the state as the length of line or mains in the streets bears to the length of the whole line or mains. In other words, the tax here was measured by the length of the line or mains in the streets.

The New Jersey Appellate Court had held that this tax was not a property tax, but was "merely an excise tax," measured in part by gross earnings on its franchise to exist as a corporation, and its franchise to occupy the streets of the state.

This court held that a tax of that character was repugnant to the Commerce Clause. The court said:

> "But, as the Constitution vests exclusively in the Congress power to regulate interstate and foreign commerce, a state may not tax, burden or interfere with such commerce or tax as such gross earnings derived therefrom or impose a license fee or other burden upon the occupation or the privilege of carrying on such commerce, whatever may be the instrumentalities or means employed to that end."

Here, again, it is interesting to note that an attempt was made by the representatives of the state to avoid the claim of invalidity under the Commerce Clause, on the basis of the language of the Appellate Court of New Jersey, to the effect that the tax was not in fact laid upon the right or privilege to engage in interstate commerce. The court said:

> "The language of the act and the decisions of the courts of the state are to be given consideration in determining the actual operation and effect of the tax. But neither is necessarily decisive for, whatever the

terms used by the legislature to impose the tax or by the courts in reference to it, the law cannot be sustained if it operates to burden or regulate interstate business."

With respect to the method and basis for assessing the tax, the court said:

"We think it very plain that the exaction is not a tax on property nor in substitution for or in lieu of a property tax. Within the rule heretofore applied in this court the exaction is a direct tax on gross receipts derived from appellant's interstate commerce and, as to that part at least, is void."

In this connection, we refer to the case of *Helson v. Kentucky*, 279 U. S. 245. The statute imposed a tax of three cents per gallon on all gasoline sold within the commonwealth at wholesale. The term "at wholesale" was defined to include any sales made for the purpose of resale or distribution or for use, as well as gasoline furnished or supplied for distribution, within the state; and, also, to mean and include any person who shall purchase or obtain gasoline without the state, and sell, distribute, or use it within the state. Suit was brought to collect an amount claimed to be due under this statute from Helson and his partner, who were engaged in the operation of a ferryboat on the Ohio River, between Kentucky and Illinois. They were engaged exclusively in interstate commerce. The motive power of the ferryboat operated by them was gasoline, all of which was purchased and delivered to them in Illinois. It was stipulated that 75 per cent of the gasoline used in operating the ferryboat was consumed within the limits of Kentucky, but that all of the gasoline so consumed by them in the operation of the ferryboat was in making the interstate journeys. The claim of the state was for the tax upon the gasoline so consumed. The court held that the act, as applied to them, was unconstitutional, and violated the Commerce Clause of

the Constitution. The court said:

> "The power vested in Congress to regulate commerce embraces within its control all the instrumentalities by which that commerce may be carried on."

We refer to this case because of the clear statement of the principles applicable to excise taxes where interstate commerce is involved. As having a direct bearing upon the case at bar, we quote the following from the opinion:

> "In Minot v. Philadelphia, W. & B. R. Co., 2 Abb. (U.S.) 323, 343, Fed. Cas. No. 9,645, it was held that a state law imposing a tax for the use within the state of locomotives, passenger and freight cars, and for the use of rolling stock generally, was a license fee exacted for the privilege of such use. It appearing that the larger portion of the locomotives, etc., were used for the interstate transportation of persons and property, the court held that the statute constituted a regulation of such commerce. In the course of the opinion, by Mr. Justice Strong, it is said:
>
> " 'It is of national importance that in regard to such subjects there should be but one regulating power, for if one state can directly tax persons and property passing through it, or indirectly, *by taxing the use of means of transportation*, every other may; thus commercial intercourse between states remote from each other may be destroyed.'
>
> "To the same effect is a decision by Mr. Justice Matthews, in respect of a similar state statute imposing a tax for the running or using of sleeping cars within the state in the transportation of interstate passengers. Pullman Southern Car Co. v. Nolan, (C.C.) 22 Fed. 276, 280, 281. On error to this court, the decision was affirmed and the tax condemned as one laid on the right of transit between states. Sub nom. Pickard v. Pullman Southern Car Co., 117 U. S. 34, 46, 29 L. ed. 785, 789, 6 Sup. Ct. Rep. 635."

This comparatively recent case reiterates and approves the doctrine established by the decisions which we have already referred to with some particularity.

(b) *As the telephone business has been developed with the common use of the telephone instruments, poles, wires, switchboards, and other instrumentalities in both intrastate and interstate commerce, the appellee could not discontinue the intrastate business in Montana without withdrawing, also, from the interstate business. For this reason, the acts are invalid, and violate the Commerce Clause of the Constitution of the United States.*

In *Sprout v. South Bend*, 277 U. S. 163, the court, in an opinion dealing with the right of a municipality to impose a license tax upon busses operated in interstate commerce, and in holding the ordinance void, and in violation of the Commerce Clause, laid down the following proposition (opinion by Mr. Justice Brandeis):

> "But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; *and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business.*" (Italics ours.)

In support of this proposition, the court cites many authorities, including the case of *Bowman v. Continental Oil Co., supra.*

It is the fourth and last proposition thus laid down by this court that we consider under this heading, and this statement was repeated in *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465 (opinion by Mr. Justice Butler).

No argument is required to convince this court that the appellee cannot render interstate communication at rates which would not be prohibitive if it should discontinue its intrastate business in the State of Montana. Further, it would have been impossible for appellee to develop its interstate service to its present condition and extent, and it would be impossible to further develop such service, were it not for the intrastate service now being furnished. Upon this proposition the evidence is clear and uncontradicted, that it would not be possible or practicable to separate the Montana business from the interstate or international business. We quote the testimony:

> "It would not be possible to operate separately these two classes of service, because, as I indicated there on the map, the same telephone, the same signaling apparatus, the wires in the building, the drop wires to the cables, and the cables, poles, wires, and underground wires we have in the streets and alleys between our customers and telephone and central-office equipment, are used for all classes of service. It is common usage. Largely, your land, buildings, central-office equipment and operating organization is used in common for all services. We think it is obvious to any one with experience that to separate those classes of service would require a hundred per cent duplication of outside distribution plant and telephones, and a large part of duplication of the central-office equipment. The attendant expense of such a disconnected operation would substantially destroy telephone service as it is known today. Your prices would become prohibitive." (R. 39.)

And the court, in Paragraph 9 of the Findings of Fact, said:

> "That all of said telephones constituting a part of said system in Montana are instrumentalities of

interstate and foreign commerce, and plaintiff could not discontinue its intrastate business and operations in Montana without virtually destroying and being compelled to abandon and withdraw from its interstate and foreign business." (R. 25.)

It is surprising in the face of this undisputed testimony, and this finding of the trial court, that an argument should be presented to this court that the telephone company in Montana could discontinue its intrastate service without withdrawing also from the interstate service.

It is unthinkable that the present investment and facilities of the company in Montana would ever have been constructed and installed, or that it would or could be maintained for the sole purpose of rendering interstate service, and it is equally unthinkable that it could or would be maintained and operated in the future for that purpose alone. What Mr. Justice Brandeis and Mr. Justice Butler and this court must have had in mind in the use of the language now under consideration, and quoted from *Sprout v. South Bend, supra*, and which was repeated in *East Ohio Gas Co. v. Tax Commission, supra*, was whether the person taxed could discontinue the intrastate business without withdrawing from interstate business, from a practical standpoint. It is hard to conceive of any common business involving both intrastate and interstate commerce, which could not, as a matter of physical fact, be separated. If the necessary consequences are to be disregarded, and all of the practical considerations ignored, intrastate service or operations could be discontinued so as to avoid the payment of the tax, and it would still be physically possible to continue the interstate service or operations. Take, for example, the license tax imposed upon the filling stations, or distributing stations, of the Oil Company in *Bowman v. Continental Oil Co., supra*. The court said: "The subject taxed is not in its

nature divisible." Of course, the court considered the matter in a practical way, because it would be physically possible to have duplicate filling stations or distributing stations—one dealing exclusively in intrastate commerce, and one dealing exclusively in interstate commerce, and it would be physically possible for the Oil Company to discontinue entirely its intrastate business, although it amounted to 95.5 per cent of its total business, and to attempt at least for a time to continue the interstate business.

The situation with respect to the telephone business is unique, and presents the strongest case that can be thought of wherein, as a practical matter, the person taxed could not discontinue the intrastate business without also withdrawing from the interstate business. It is wholly different from such cases as are relied upon by appellants involving brokers and commission merchants.

Appellants, in their Brief (p. 52) construe the language in *Sprout v. South Bend, supra,* which we are considering here, and which, as already indicated, was repeated in *East Ohio Gas Co. v. Tax Commission, supra,* as involving the mere legal right to discontinue intrastate business without withdrawing also from the interstate business. They say:

> "It would seem, therefore, that what the Court had in mind in the *Sprout case, supra,* was that one doing an interstate and intrastate commerce could not be taxed for the intrastate commerce unless he is *legally free* to withdraw from the latter so as to avoid the burden of the tax." (Italics ours).

What the court said in these two cases was that, in order for the tax to be valid, it must appear "that the person taxed *could* discontinue the intrastate business without withdrawing also from the interstate business."

In support of their argument that the court had in mind here a mere *legal* conception rather than a practical conception of the situation, they say that the court was not considering the practicability of withdrawing. What was the court considering when it used this language in the two decisions referred to? It was not considering the mere legal right to withdraw from the intrastate business. And why did the court cite *Bowman v. Continental Oil Co., supra,* among other cases, for this proposition? For it is perfectly clear that the Continental Oil Company had a legal right to withdraw from the merchandising business in which it was engaged in New Mexico, and yet in *Bowman v. Continental Oil Co., supra,* the court said:

"The subject taxed is not in its nature divisible."

Clearly, it was divisible, if the mere legal right to make a division is all that is involved.

Appellants would insert the words "legally could discontinue" for the words "could discontinue." Surely, Mr. Justice Brandeis and Mr. Justice Butler did not both fall into the error, all unnoticed by the Chief Justice and the other Justices, of saying "could discontinue," when they meant, "legally could discontinue."

(c) *The acts make no attempt to discriminate as between intrastate commerce and interstate commerce, and, indeed, it would be impossible to do so. The disavowal of the Attorney General of Montana of any intent to burden interstate commerce does not aid his case.*

The acts make no attempt whatever to discriminate as between intrastate commerce and interstate commerce. They are simply made applicable to all persons and corporations "engaged in the business of operating or maintaining telephone lines, and furnishing telephone service in

the State of Montana," and the license tax is imposed "for each telephone instrument used, controlled and operated by it in the conduct of such business." In connection with every interstate call, either originating or terminating in Montana, telephone lines and a telephone instrument located in Montana are used, controlled and operated by the company in the conduct of such business.

The Attorney General of Montana argues that it was the intention of the Legislature to levy a license tax only upon the domestic or intrastate business of the company. We submit that there is no justification whatsoever for such a contention under the language of the acts. The acts have not been passed upon, on construed by the Supreme Court of the state. In *State v. Rocky Mountain Bell Tel. Co.*, 27 Mont. 394, 71 Pac. 311, a case decided in 1903, construing a statute passed in 1897 before there was any interstate line in Montana (R. 37), imposing a license tax upon telephone companies in each county where such business is transacted, of 75 cents per year for each telephone instrument in use, the court held that:

> "The evident intention of the Legislature in passing Section 4071 above was to impose the license tax of 75 cents on each telephone instrument *used in purely local or intrastate business*, and that as to instruments used in interstate business it was intended to have no application whatsoever." (Italics ours.)

We mention the year in which the Legislature passed that statute, which was, as shown by the testimony in the case at bar, more than two years prior to the completion of the first interstate telephone line into Montana (date of Statute 1897, and the first interstate line built in September, 1899, R. 37), because at that time no telephone instrument within the State of Montana was an instrumentality of interstate commerce. The legislative intent was, of

course, limited to the situation which existed at the time the act was passed. There could have been no intent to impose a license tax upon telephone instruments used in interstate commerce when there were no instruments used in interstate commerce. It is not strange, therefore, that the court held that the legislative intent was to impose the license tax on each telephone instrument used in "purely local or intrastate business."

Shortly after the decision which we have just been discussing, another case came before the Supreme Court of Montana, involving the validity of a license tax imposed against express companies. The act was general in its terms, and made no discrimination whatsoever as between intrastate and interstate commerce. In holding the statute invalid as violating the Commerce Clause, the court said:

> "The license tax imposed under Section 4074 above is a gross amount imposed upon the entire business of the express company and required as a condition precedent to its engaging in, or following its occupation. The statute does not by its terms attempt to make any discrimination between the local and interstate business of the defendant company, and no such discrimination can be made under any fair construction of the language employed. We hold, therefore, that the statute attempts to impose the license upon the entire business of the company and a portion of that business being interstate in its character, the license is an interference with, and an attempted regulation of, interstate commerce, and is void as in contravention of the constitutional provisions conferring upon Congress sole power to regulate commerce with foreign nations among the several states and with the Indian tribes."
>
> *State v. Northern Pacific Express Co.*,
> 27 Mont. 419, 71 Pac. 404.

If the ultimate fact is that a license tax is imposed for

the doing of an interstate business, or for the use of instrumentalities in interstate commerce, the statute is void under the Commerce Clause. This is true, regardless of the wording of the statute, or any claim that may be asserted with respect to it. To illustrate what we have in mind: suppose the statute had provided that it was the intention of the Legislature to impose a license tax upon the right and privilege of the company to engage in intrastate business in Montana, and that nothing in the statute should be construed to impose a license tax upon the right and privilege of engaging in interstate commerce, and the statute then specifically based the tax upon the gross receipts of the company derived from interstate commerce, can there be any doubt that the statute would be unconstitutional, notwithstanding the expessed intent of the Legislature? Likewise, if the statute used the language we have just assumed by way of illustration, after imposing a license tax upon the use of telephone lines and telephone instruments, just as certainly the statute would be void when it is made to appear that the telephone lines and the telephone instruments are instrumentalities of interstate commerce. Accordingly, the Attorney General of Montana serves no purpose in arguing from the language of the statute or otherwise that it was the intention of the Legislature to levy a license tax only upon the domestic or intrastate business of the company.

We have already referred to the case of *Bowman v. Continental Oil Co., supra,* in which this court clearly held that a license tax for the use of an instrumentality employed in both intrastate and interstate commerce indiscriminately at the same stations and by the same agencies, is unconstitutional; that in such a situation it makes no difference that the executive or administrative officers of the state have disavowed any purpose to exact payment of a license tax

for the privilege of engaging in interstate commerce, because the act could not be enforced otherwise than as prescribed therein. As a matter of fact, no administrative officer in Montana has undertaken to interpret or apply the acts in any manner other than as required by the express language of the acts.

We have referred also to *New Jersey Bell Tel. Co. v. State Board of Taxes and Assessment, supra,* in which this court referred to the language of the act, and the decisions of the state court construing it, and we quote again at this place this sentence:

> "But neither is necessarily decisive for, whatever the terms used by the legislature to impose the tax or by the courts in reference to it, the law cannot be sustained if it operates to burden or regulate interstate business."

In *Western Union Telegraph Co. v. Kansas,* 216 U. S. 1, the court said:

> "But the disavowal by the state of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute, as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction, as the adjudged cases abundantly show."

The case at bar is very different from the two classes of cases relied upon by appellants. In one class of cases cited,

a license or excise tax was imposed in a lump sum, as against a company engaged in both intrastate and interstate business or commerce. In such case it is possible for the statute, or the ordinance, to be so worded as to impose the license or excise tax only upon the privilege of carrying on the intrastate commerce; or the statute, or the ordinance, may be so general in its terms, and so worded as to make no distinction whatsoever between intrastate commerce and interstate commerce. Accordingly, in all such cases it becomes important to construe the statute, or the ordinance, to ascertain whether the legislative intent was to impose the tax only upon the privilege of doing the intrastate business, or whether the legislative intent was to impose the tax upon the privilege of engaging in both classes of business. Where there is any ambiguity in the statute, this court would consider the administrative rulings and any decision of the highest court of the state involving the construction of the statute. Falling into this class are the following cases cited by appellants:

Osborne v. Florida, 164 U. S. 650, involving a license or excise tax upon express companies in a flat sum.

Postal Telegraph-Cable Co. v. Charleston, 153 U. S. 692, involving a like tax upon telegraph companies.

Postal Telegraph-Cable Co. v. City of Fremont, 255 U. S. 124, involving a like tax upon telegraph companies.

Postal Telegraph-Cable Co. v. City of Richmond, 249 U. S. 252, involving a like tax upon telegraph companies.

Keher v. Stewart, 197 U. S. 60, involving a like tax upon agents of packing houses.

Raley and Bros. v. Richardson, 264 U. S. 157, involving a flat tax upon brokers or commission merchants.

The other class of cases involves a license or excise tax upon companies engaged in both intrastate and interstate commerce, where the tax is based upon, or measured by, the gross earnings of the company. Typical of such class of cases is *Express Co. v. Seibert*, 142 U. S. 339, cited by appellants.

In case of ambiguity in such a statute, or ordinance, it becomes important to determine whether the legislative intent was to base or measure the tax by the total gross earnings of the company in both classes of business, or whether it was the legislative intent merely to base the tax upon, or measure it by, the gross revenue derived from intrastate commerce. Accordingly, in such cases we have a pure question of statutory construction—a mere question of legislative intent, and in such cases this court would give consideration, in case of ambiguity, to administrative rulings, and to the decision of the highest court of the state construing the statute or ordinance.

But in the case at bar, where the language of the Acts is clear, and imposes a license or excise tax upon telephone instruments, which this court judicially knows, and which the undisputed evidence and the findings in this case show, are instrumentalities of interstate commerce, designed for such use and actually so used, no administrative ruling, nor any disavowal of intent to interfere with interstate commerce *(Bowman v. Continental Oil Co., supra)*, nor even the language of the statute itself, nor any construction placed thereon by the highest court of the State *(New Jersey Bell Tel. Co. v. State Board of Taxes and Assessment, supra)*, will prevail in this court against a claim based upon the Commerce Clause of the Constitution of the United States. None of the cases where a license or excise tax was imposed in a flat sum, or upon gross receipts, have any appli-

cation to, or bearing upon, the case at bar. Here, it is not a question of what the Legislature intended, or what the Attorney General of Montana claims with respect to the legislative intent. It is a question of what the Legislature did, and what the Legislature did was to impose a license or excise tax upon instrumentalities employed in interstate commerce.

If the license or excise tax is imposed upon instrumentalities used in interstate commerce as so much per express wagon, or so much per Pullman car, or so much per locomotive, or so much per distributing station, or so much per telephone, and the fact is, that the express wagons, or the Pullman cars, or the locomotives, or the distributing stations, or the telephones, are used in both intrastate and interstate commerce, no amount of discussion or argument or disavowal of intent to interfere with interstate commerce, or administrative ruling or interpretation, or even judicial construction of the statute or ordinance by the highest court of the State, will save the statute, or the ordinance, from coming in conflict with the Commerce Clause of the Federal Constitution.

(d) *Some observations with respect to appellants' brief on the interstate commerce feature of the case.*

Notwithstanding the plain language of the original act (R. 9), requiring payment of "a license tax in the amounts following *for each telephone instrument used* • • • based upon the *number of telephone instruments* • • •," and the language of the amended act (R. 10), requiring payment of "a license tax in the amounts following *for each telephone instrument* used, controlled and operated by it in the conduct of such business: A license tax of Two Dollars ($2.00) *for each such instrument*" (italics ours), appellants attempt to argue that the acts impose a tax upon telephone instru-

ments, in form only. They conveniently assume that it is in fact a tax upon intrastate business only, measured by the number of telephones in intrastate use, and without regard to any interstate use of such instruments. They urge the court to be ingenious, and, by some legerdemain of construction, throw out of the acts such language as "a license tax in the amounts following for each telephone instrument used," and substitute therefor a license tax on intrastate business only. They clothe their prayer for such ingenious construction in the respectable language of an old, well-established rule of construction—that the court should look through form to substance, but this ancient canon is capable of no such perversion. Of course, the same argument was just as appropriate with respect to the Pullman cars in the case of *Pickard v. Pullman Southern Car Co., supra,* and with respect to the express wagons in *Barrett as President of the Adams Express Co. v. City of New York, supra,* and with respect to the distributing stations in *Bowman v. Continental Oil Co., supra,* and the miles of wire in *New Jersey Bell Tel. Co. v. State Board of Taxes and Assessment, supra;* but the court was not misled by any such argument in any of these cases.

Further, appellants seek to argue that the tax is laid exclusively on revenues derived from local business, because the acts identify the telephone instruments to be taxed by reference to the monthly charge to the customer. The tax, however, is not laid as a percentage or portion of that monthly rate. The tax is in the same amounts for the use of instruments, where the monthly charge is above the stated minimums, regardless of the actual charges for the local business, or the returns from that local business. For example: under the act as amended, the tax for the use of an instrument by a subscriber at his residence is $2.00 per an-

num, without regard to whether the monthly rate paid by the resident subscriber is $2.25, or $3.00, or $5.00, or any other sum in excess of the stated minimum of $2.00, and the tax is the same whether an instrument is used one month or a year. Consequently, it must follow that the tax has no relation whatever to the intrastate revenues. The monthly rate is only used by the Legislature in purported justification for identifying and discriminating between the instruments that are, and those that are not, to be subject to the license tax. Here, it is to be remembered that the record indisputably establishes that each instrument is used, or is capable of being used, not only in local exchange service, but also for intrastate toll service, and interstate and foreign toll service. The acts exact the license tax for the use of the instrument, without regard to whether its use is for exchange service, for intrastate toll, or for interstate and foreign toll service. Once the instrument is identified as being taxable under the acts by reference to the monthly charge, then it is subject to the license tax, although in fact it might never be used except exclusively in interstate or foreign toll service.

II.

THE ACTS DENY TO THE COMPANY THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

(a) *Because of the exceptions therefrom of telephone instruments as therein stated.*

Both the original act and the amended act provide for the exemption of instruments from the tax, where the rate charged the customer therefor does not exceed $2.00 per month for residence telephones, and in the original act,

$3.00 per month for business telephones (which in the amended act has been increased to $4.00 per month for business telephones). The original act also has a graduated scale for the first seventy-five telephones, being ten cents per telephone for the first twenty, twenty cents for the next fifty-five, and One Dollar for each instrument over seventy-five. These exemptions have the practical effect of exempting fifty of the sixty-four telephone companies operating in Montana (R. 36).

No evidence was submitted by appellants justifying, or attempting to justify, this discrimination between telephone companies operating in the State of Montana, and we submit that no evidence could have been presented that would justify this obvious discrimination, for this court has recognized that it is a peculiarity of the telephone business that the expenses of conducting that business in larger exchanges are higher per station than are the expenses in the smaller exchanges.

Railroad Commission v. Cumberland Tel. & Tel. Co., 212 U. S. 414.

Subclassification of telephone companies on the basis of the rates charged, and the exemption of those telephones for which a lesser rate is charged is without basis in law or fact, and such subclassification is such a denial of the equal protection of the laws as was denounced by this court in *Louis K. Liggett Co. v. Lee*, 288 U. S. 517. In that case, the Florida statute imposed upon every person, firm, corporation, association or copartnership opening, establishing, operating or maintaining one or more stores within the state under the same general management, supervision or ownership, a license fee for the privilege of carrying on such business, measured by the number of stores maintained

or operated, the fee being fixed at $5.00 for one store, $10.00 each for two or more, but not exceeding fifteen stores where the same were located in any one county, $15.00 for each additional store from two to fifteen where the same were located in different counties, and so on, the fee for each store being stepped up in amount as the number constituting the chain reaches certain specific limits. The act imposed a tax only on retail stores, and excluded from the definition of a store filling stations engaged exclusively in the sale of gasoline and other petroleum products. The act also imposed a levy of $3.00 for each $1,000.00 of value of stock carried in each store, or for sale in each store, and this was defined to include merchandise owned by the taxpayer, and held in storage to be sold in or through such store. This court re-affirmed its holding in *State Tax Commissioners v. Jackson,* 283 U. S. 527, which held that under the facts established in that case, there was such a difference in the method and character of the business of chain stores, as distinguished from that of a retail store individually owned, that the Legislature was justified in making that "distinction the occasion of classification for the purposes of taxation," but held that where the Legislature went farther and attempted to subclassify chain stores themselves, and to impose upon chain stores operating in several counties a higher tax than upon those operating only in one county, and there was no reasonable basis in fact for such subclassification, the act of the Legislature was unreasonable and arbitrary, and denied the equal protection of the laws, guaranteed by the Fourteenth Amendment. We can see no difference between that sub-classification of chain stores, which was attempted to be made by the Florida statute considered in the Liggett Case, and the subclassification of telephone companies, attempted to be made by the Montana acts now under consideration.

In *Cotting v. Godard*, 183 U. S. 79, this court held that a stockyards company is denied the equal protection of the laws by an act which limits the amount of charges to be made by that corporation, without limiting the charges to be made by other similar, but smaller corporations, doing a smaller amount of business, and without any reference to the character or value of the services rendered, even though the statute was general in its terms, and was made applicable to any corporation doing business of a certain amount. It was held that such a statute makes a positive and direct discrimination between persons engaged in the same class of business, the only difference being the quantity of business which each may do. The act there under consideration exempted from its operation stockyards wherein less than one hundred head of cattle a day were received. This court said (P. 112):

> "But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business, and under the same conditions, burdens are cast which are not cast upon the other. * * * This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

In *Louisville Gas & E. Co. v. Coleman*, 277 U. S. 32, this

court held void a statute imposing a privilege tax upon mortgages lodged for record, where the indebtedness secured thereby did not mature within five years. No tax was imposed where the indebtedness matured within five years. This court, while recognizing that the power of the state to classify for purposes of taxation is of wide range and flexibility, stated:

> "That the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' * * * That is to say, *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' * * * * Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."

This court recognized that the privilege of recording the short-time lien, and that of recording the long-time lien had different taxable values, but said:

> "But classification good for one purpose may be bad for another; and it does not follow that because the state may classify for the purpose of proportioning the tax, it may adopt the same classification to the end that some shall bear a burden of taxation from which others under circumstances identical in all respects save in respect of the matter of value, are entirely exempt.
>
> "Here it seems clear that a circumstance which affects only taxable values has been made the basis of a classification under which one is compelled to pay a tax for the enjoyment of a necessary privilege which, aside from the amount of the recording fee which is

> paid by each, is furnished to another as a pure gratuity. Such a classification is arbitrary."

The Montana Supreme Court has recognized that under the constitution of that state, as well as the Constitution of the United States, license taxes cannot be discriminatory as between individuals of a class.

Hale v. Treasurer Mineral County,

82 Mont. 98, 265 Pac. 6.

The court there had under consideration a statute imposing a license tax upon livestock coming into the state to graze for any length of time whatsoever. The court held this statute unconstitutional and discriminatory, because the tax did not apply to livestock brought into Montana to be fed in pens, but only applied to those brought in for grazing purposes. The court, in considering one of its earlier decisions, which held that the license system was not controlled by the equality and uniformity requirements of the Constitution, said:

> "But it does not follow that in imposing a license tax, the Legislature may disregard the principles of uniformity and equality altogether; it may not resort to unreasonable or arbitrary discrimination."

No facts have been disclosed by the appellants, justifying the discriminatory classification contained in the acts, as was done in the cases relied upon by them, nor is this a case where the distinction, upon which the classification is made, is obvious, as in the case of the exemption contained in *Armour & Co. v. Virginia*, 246 U. S. 1, cited by appellants. We are not contending that that portion of the amended act which exempts mutual companies denies the appellee the equal protection of the laws, for that such an exemption can be made seems to have been established by

this court in *Citizens Tel. Co. v. Fuller*, 229 U. S. 322; but we submit that the unreasonable and arbitrary attempted subclassification of telephone companies upon the basis of the rates charged, and the exemption of certain other telephones thereunder, has no basis in law or fact, and denies to appellee the equal protection of the laws.

(b) *The penalties imposed by the Acts are so severe and excessive as to deny to the company the equal protection of the laws.*

Section 3 of the original Act provides:

> "Any violation of any of the provisions of this act shall be deemed a misdemeanor, and shall be punished by a fine of not more than $1,000, and by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

This section of the original act is applicable to the amended act.

Appellants contend in their brief that the penalties imposed by the Montana acts are not so excessive and severe as to constitute a denial of the equal protection of the laws within the rule pronounced by this court in *Ex parte Young*, 209 U. S. 123, and other cases. It is true that in *Ex parte Young* the amount of the penalty was larger than that imposed by the Montana act, but the court did not consider the amount of the penalty alone as the determining factor. The sale of each railroad ticket above the price permitted by the act there under consideration would be a violation thereof. In Montana, we have two acts which attempt to exact from the appellee two license taxes within the same year. Appellee is required to pay a license tax "for each telephone instrument used, controlled and operated by it in the conduct of such business." Under the first act, it is not permitted to pass this tax on to the consumer, but it is required that the tax "shall be borne entirely by the own-

ing and operating concern." By the second act, appellee is prohibited from showing the tax in any manner on any statement or account rendered to the subscriber. If it pays the tax under the original act, but attempts to charge that tax to operating expenses, it would be guilty of a violation of the act, and subject to the penalties thereby imposed. If it refuses to pay the tax imposed under the first act, it is subject to the penalties, and if it refuses to pay the second tax, it has violated the statute, and is again subject to the penalties. If it pays the tax under the second act, and shows the amount of that tax on a statement sent to a subscriber, it has violated the statute, and incurred the penalties. If the statute were construed as this court construed the statute considered in *Ex parte Young*, so that the failure to pay a license tax "for each telephone instrument" constituted a separate violation of the act, it would be subjected to such severe penalties that the aggregate of those penalties might exceed the value of its properties in the State of Montana. In this connection, it is important to note that the acts do not purport to impose a license tax for the privilege of doing a general telephone business in the state, but that they exact the payment of a tax for using, controlling and operating separate telephone instruments, which are essential in the conduct of the general telephone business.

The case upon which appellants rely principally is that of *Rast v. Van Deman and Lewis*, 240 U. S. 342, where they say the penalties are the same as that imposed by the Montana acts. They are not identical, however, for while the amount of the fine and the term of imprisonment is the same, the statute under consideration in that case did not permit the imposition of both the fine and imprisonment; and, further, it is apparent that the situation which there confronted those contesting the statute, in no way compares with the situation which confronts the appellee. The issue there pre-

sented seems to have been limited to the imposition of a single penalty. Appellee here is confronted with the imposition of many penalties.

While in *Missouri Pacific Ry. Co. v. Tucker*, 230 U. S. 340, the statute specified the sum of $500.00 as "liquidated damages," this court seems to have considered it as being in the nature of a penalty, and by virtue of the fact that it could be successively imposed, it was held to be arbitrary and oppressive, and therefore unconstitutional. We do not contend that the court expressly held in that case that the statute denied to the Railway Company the equal protection of the laws, but cite the case as illustrating the principle laid down by this court in *Ex parte Young*.

The other decision of this court relied upon by appellants is *Rail, etc., Coal Co. v. Yaple*, 236 U. S. 338. There, only a fine in an amount from $300.00 to $600.00 was under consideration.

In *State v. Crawford*, 74 Wash. 248, 133 Pac. 390, a statute imposing a penalty consisting of imprisonment for not to exceed one year, or a fine not to exceed $1,000.00, or both, was held unconstitutional, as denying the equal protection of the laws. This decision is subsequent to *State v. Oregon, etc. Co.*, 68 Wash. 160, 123 Pac. 3, cited by appellants in their brief.

Summing up the argument under Subdivision II, we respectfully submit, that by reason of the arbitrary subclassification of telephone companies attempted to be made by the acts under consideration, whereby less than one-fourth of the telephone companies operating in the State of Montana are affected by the acts, and by reason of the excessive, arbitrary and oppressive penalties imposed, the acts deny to the appellee the equal protection of the laws, guaranteed to it by the Constitution of the United States.

III.

THE ORIGINAL ACT CONSTITUTES A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW, CONTRARY TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT IT PROVIDED THAT THE LICENSE TAX SHOULD IN NO MANNER AFFECT THE RATES CHARGED THE PATRONS OF THE COMPANY, BUT SHOULD BE BORNE ENTIRELY BY THE COMPANY.

There is no doubt about such a tax constituting an expense which must be taken into consideration in determining reasonable rates.

Galveston Electric Co. v. Galveston,
258 U. S. 387;
Consolidated Gas Co. v. Newton,
267 Fed. 231.

To prohibit the company from charging such a tax as an expense in the establishment of rates, constitutes a taking of property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States. We take it that appellants concede this proposition.

On Page 9 of appellants' brief, they say:

> "The statute does not prevent the charge of the tax to operating cost. If a clause in the original act so provided, that clause may be void without rendering the whole act unconstitutional."

Accordingly, we need not further argue this question. Appellants do suggest that inasmuch as the company has not made application to the Public Service Commission for increase in rates, it cannot complain. The suggestion that

the remedy of the company in such case is to ignore the act and the penalties and apply to an administrative body to disregard a plain, legislative provision or to declare it unconstitutional, is certainly a novel argument, and requires no answer.

It is suggested, however, that the invalidity of this provision does not render the whole act unconstitutional. We deny that this is a separable provision, and that its invalidity does not result in the invalidity of the act as a whole. The Legislature, in passing the act, manifested a very definite purpose that the ratepayers should in no manner be charged with the expense involved, but that the company itself should stand the expense. How can a court say that the Legislature would have passed the act without the void provision, with the result that one of the important things sought to be accomplished by the Legislature would have been entirely unavailing?

The courts are loath to consider the provisions of an act separable, and even where the Legislature itself has declared that if any portion of the act shall be held unconstitutional, it shall not affect the validity of the remaining portions of the act, the courts still proceed with great caution in the determination of the question. The general rule is well stated in *Williams v. Standard Oil Co.*, 278 U. S. 235. The court said:

> "But the general rule is that the objectionable part of a statute cannot be held separable unless it appears that, 'standing alone, legal effect can be given to it, and that the Legislature intended the provision to stand, in case others included in the act and held bad should fall.' "

And again, quoting from a previous decision:

> "In seeking the legislative intent, the presumption

is against any mutilation of a statute, and the courts will resort to elimination only where an unconstitutional provision is interjected into a statute otherwise valid, and is so independent and separable that its removal will leave the constitutional features and purposes of the act substantially unaffected by the process."

IV.

THE ACTS IMPAIR THE OBLIGATION OF THE CONTRACT WITH APPELLEE, RESULTING FROM THE CONSTRUCTION OF A TELEPHONE SYSTEM IN MONTANA, PURSUANT TO THE RIGHT GRANTED BY SECTION 14, OF ARTICLE XV, OF THE MONTANA CONSTITUTION.

It is alleged in the complaint (R. 2), and admitted by the appellants in their answer (R. 13) that the State of Montana, under and by virtue of Section 14, of Article XV, of the Constitution of said state, and Sections 6645 and 6646, of the Revised Codes of Montana of 1921, granted to the appellee "the right to maintain and operate telephone lines and a telephone system in the State of Montana," and that that grant has been accepted by the appellee, and that appellee has constructed, and is maintaining and operating, a comprehensive telephone system in Montana, which is a part of a system extending throughout the states of Montana, Idaho, Utah, Wyoming, Colorado, Arizona, New Mexico, and a part of Texas. Appellants concede that the acts in question require the payment of a license tax for the privilege of engaging in the telephone business in Montana, at least in so far as the intrastate business is concerned. We have contended that this act imposes a license tax for the use of telephone instrumentalities, which instrumentalities are necessary in the conduct of telephone business. Without

the use of those instruments there is a practical denial of the right to engage in the telephone business in the State of Montana. Appellants do not deny that the tax is imposed for the privilege of doing such a telephone busniess, claiming only, as we understand it, that the tax is for doing an intrastate telephone business. Appellants argue, however, that Section 7, of Article XII, of the Montana Constitution, authorizes the imposition of a license tax of this character, irrespective of the provisions of Section 14, of Article XV. The Supreme Court of Montana has held, however, that Section 7, of Article XII, has reference only to a property tax. In the case of *Northwestern Mutual Life Ins. Co. v. Lewis and Clarke County*, 28 Mont. 484, at 495, 72 Pac. 982, at 985, it is said:

> "Section 7, of Article XII, of the Constitution provides, among other things, that 'the power to tax corporations or corporate property shall never be relinquished or suspended.' The evident meaning of this constitutional provision is that the property of corporations shall bear its equal share of the burdens of taxation, and that the provisions of Section 1 of this article of the Constitution, that the Legislature 'shall prescribe such regulations as shall secure a just valuation for taxation of all property' applies to artificial, as well as to natural persons."

Appellants have admitted in their answer (R. 12) that all such general property taxes then due, imposed by the State of Montana, have been paid by the appellee (R. 6), and that appellee has also paid license taxes due and payable under and by virtue of Sections 2296 to 2304, inclusive, of the Revised Codes of Montana of 1921, as amended, which is a general license tax, imposed alike on all corporations, foreign or domestic, for doing business as such in the State of Montana. The right of the state to impose these taxes is not in issue.

Section 14, of Article XV, of the Constitution of Montana, reads as follows:

> "Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct or maintain lines of telegraph or telephone within this state, and connect the same with other lines; and the legislative assembly shall by general law of uniform operation provide reasonable regulations to give full effect to this section."

The Supreme Court of Montana has declared that this section was incorporated in the Constitution because of the importance to the people of this means of communication.

Hershfield v. Rocky Mountain Bell Tel. Co.,
12 Mont. 102, 116; 29 Pac. 883.

The legislative assembly of Montana, in compliance with the command of this section, enacted Sections 1000 and 1001 of the Civil Code of Montana of 1895, reading as follows:

> "Section 1000. A telegraph or telephone corporation, or a person, is hereby authorized to construct such telegraph or telephone line or lines from point to point along and upon any of the public roads, by the erection of necessary fixtures, including posts, piers and abutments, necessary for the wires; but the same shall not incommode the public in the use of said roads or highways.
>
> "Section 1001. Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph or telephone within this state, and connect the same with other lines, and in case such persons or corporations can not agree as the compensation to be paid for the privilege of such connection, the acquiring of the right by the one to use the

line of the other may be had in proceedings under the code of civil procedure and the damages assessed and the right of connection granted, as provided in the code of civil procedure."

Section 1001 now appears as Section 6646 of the Revised Codes of Montana of 1921.

Section 1000 was amended by including electric light and power lines, and, as amended, now constitutes Section 6645 of the Revised Codes of Montana of 1921.

By the construction of this telephone system in Montana, the right granted by said section of the constitution and statutes was accepted, and a contract resulted, which is protected from impairment by Section 1, of Article X, of the Constitution of the United States.

Russell v. Sebastian,
233 U. S. 195.

In the case just cited, the court had under consideration a provision of the Constitution of California authorizing the construction of lighting and water systems in the cities of that state. The court, in the opinion, said:

"When the voice of the state declares that it is bound if its offer is accepted, and the question simply is with respect to the scope of the obligation, we should be slow to conclude that only a revocable license was intended. Moreover, the provision plainly contemplated the establishment of a plant devoted to the described public s rvice and an assumption of the duty to perform that service. That the grant, resulting from an acceptance of the state's offer, constituted a contract, and vested in the accepting individual or corporation a property right, protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this court." (Citing cases.)

Whether the statute in question impairs the obligation of the contract with appellee involves an inquiry as to the power of the legislative assembly of Montana to impose such a license tax upon the exercise of the right or franchise granted. It is our contention that Section 14, of Article XV, of the Constitution, prohibits the legislative assembly from enacting any statute which does not "give full effect" to the section and the right or franchise granted, and that the imposition of such a license tax burdens or impairs the right or franchise instead of giving any effect thereto.

Section 29, of Article III, of the Montana Constitution, provides:

> "The provisions of this constitution are mandatory and prohibitory unless by express words they are declared to be otherwise."

This section of the Constitution was construed in the case of *In re Weston*, 28 Mont. 207, which involved the question of the power of the legislative assembly to extend the jurisdiction of the Supreme Court of the state beyond that conferred by the Constitution. The court, in the opinion, in referring to the declaration in Section 29, of Article III, said:

> "This declaration can have but one meaning—that, with reference to these subjects upon which the Constitution assumes to speak, its declaration shall be conclusive upon the legislature, and shall prevent the enactment of any law which has for its purpose the extension or limitation of the powers which they confer."

In the case of *State v. Helena W. W. Co. ,et al.*, 43 Mont. 169, 173, which also involved the question of jurisdiction of the Supreme Court of the state, it is said:

> "The rule of interpretation to be applied in order to ascertain the limits of this jurisdiction is embodied

in the maxim, '*Inclusio unius est exclusio alterius;*' for in the Declaration of Rights this rule of interpretation is declared as follows: 'The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.' (Article III, Section 29.)"

See also:

Johnson v. City of Great Falls, et al.,
38 Mont. 369, 373.

This rule of construction of the Constitution of Montana was recognized and applied in the case of *State v. City of Helena,* 34 Mont. 67, in which it was decided that an amendment of Section 1000 of the Civil Code of Montana of 1895, providing "that the provisions of this act shall not apply to public roads and highways within the limits of incorporated cities or towns" was violative of Section 14, of Article XV, for the reason that it did not "give full effect to the grant contained in the section." In the opinion (p. 72), the court said:

"The Constitution commands the legislature to enact a law upon the subject; but, if the legislature refuses to do so, there is not any way to enforce the command. If, however, the legislature does act, the law which it enacts must be a general one of uniform operation, providing reasonable regulations which will *give full effect* to the grant contained in the section of the Constitution quoted above." (Italics ours).

In the case of *Butte v. Montana Independent Telephone Co.,* 50 Mont. 574, it was decided that Section 14, of Article XV, does not restrict the police power of the state, and that a city ordinance requiring telephone wires in the congested business district of a city to be placed underground, was valid. After quoting Section 14, of Article XV, the court, in the opinion, said:

"All power is reserved to the people unless provision is made to the contrary. Our legislature may enact laws upon any subject, unless the Constitution of this state or the supreme law of the land presents some obstacle. *In the first portion of the section quoted above, the Constitution has withheld one subject from legislative interference.* The right of a corporation or an individual to construct and maintain telephone and telegraph lines in this state and connect with other lines is specifically granted. It is true that this granting clause is not self-executing; and while the legislature might by its failure to act render the grant useless, *it cannot by any legislative action impair the right, or interfere with its exercise.* (State ex rel. Rocky Mt. Bell Tel. Co. v. Mayor, etc. of the City of Red Lodge, above.) The provision quoted, however, does not assume to confer power upon the legislature. After defining the grant, the language is: 'And the legislative assembly shall by general laws of uniform operation provide reasonable regulations to give full effect to this section.' The term 'regulations' is not employed in any restrictive sense. It means 'rules.' But the legislature is not enjoined to make all needful rules for the management or control of telegraphs and telephones, *but only such rules as are necessary to make the grant effective.* Any statute which would enable a telephone company, a telegraph company, and any individual or individuals engaged in the telegraph or telephone business, to build, equip and operate necessary lines and connect with other lines, would meet fully the constitutional requirement, as for instance, a statute empowering such a corporation or individual to invoke the power of eminent domain and to use or cross the public thoroughfares. Such effective legislation was enacted in 1895 (Secs. 1000, 1001, Civ. Code; Sec. 2211, Code Civ. Proc.); but the manner in which the right, when made effective, should be exercised was left for proper legislative control without restriction. *In State ex rel. Crumb v. City of Helena*, above, *we construed this constitutional mandate to require only such legislation as would give full*

force and effect to the grant; and we are satisfied that the construction was the correct one." (Italics ours.)

The license tax in question is for revenue, and an exercise of the taxing power as distinguished from the police power. This is admitted. (Appellants' Brief, P. 81.)

In the case of *In re Johnson*, 137 Cal. 110, 69 Pac. 971, the Supreme Court of California had under consideration a constitutional franchise to lay and maintain gas pipes in the streets of a city. The court, in the opinion, said:

> "When the sovereign authority of the state, either in its constitution or through its legislature, has created a right and expressed and defined the conditions under which it may be enjoyed, it is not within the province of a municipality, where such right is sought to be exercised or enjoyed, to impose additional burdens or terms as a condition to its exercise. The Constitution does not authorize the municipality to require a permit as a condition upon which the pipes may be laid in its streets, and its claim of a right to require a permit includes the right to refuse one; and the right to annex one condition to the exercise of the privilege implies the right to annex others, which may at least impair, if not in fact amount to a denial of, its exercise."

In the case of *Town of Suisun City v. Pacific Gas & Elec. Co.*, 35 Cal. App. 380, 170 Pac. 1078, it was decided that a city is without authority to require payment of a percentage of the gross returns from the operation of a utility pursuant to a constitutional franchise. The court, in the opinion, on a rehearing, said:

> "Indeed, since the Constitution itself directly grants to public service corporations engaged in the generation and manufacture and sale of electricity and gas the right to enter the streets and other thoroughfares of a city and use the same for the laying down of their pipes, etc., for the purpose of supplying gas and electricity to the inhabitants of such city for lighting

or illuminating purposes, we cannot see how it may or could consistently be held that the right so granted may in any way be hampered or impaired or qualified by any act of such city; and certainly such might well be held would be the effect of a ruling that the city may exact a charge from such corporations for supplying gas or electricity, or both, to the inhabitants of such city for use for illuminating purposes."

To the same effect, see:

City of Oakland v. Great Western Power Co.,
186 Cal. 570, 200 Pac. 395.

If the legislative assembly of Montana can make the exercise of the right or franchise granted subject to the condition of payment of a license tax, then, as said by the Supreme Court of California, other conditions might be attached, and the right or franchise granted, rendered useless.

By reference to the provision of the Constitution of California, considered in the foregoing cases, and quoted in the opinion in the case of *Russell v. Sebastian*, 233 U. S. 195, it will be seen that there was no express prohibition against the city imposing conditions upon the exercise of the right or franchise granted by the Constitution.

If the legislative assembly can now legally impose this license tax, it could have provided, in the legislation enacted pursuant to the command of Section 14, of Article XV, that the right granted by said section could be exercised only upon the payment of such a license tax. Would such a provision be considered as giving full effect to the right granted?

We are unable to distinguish between the effect of the imposition of such a license tax upon the right granted by said section of the Constitution, and the effect of imposing

a license tax upon the business of engaging in interstate commerce. The theory upon which a license tax imposed upon such a business is unconstitutional is that it is a burden upon such commerce, and an infringement or impairment of the right to engage in such business.

As has been said by this court many times, if the power to impose a license tax of this character exists, there being no limit to the amount of such a tax, it might be made so large as to render the grant valueless, and nullify the intent of the people in incorporating such a provision in the Constitution.

Philadelphia & Reading R. R. Co. v. Pennsylvania,
15 Wall. 232;
Pickard v. Pullman Co.,
117 U. S. 34;
Leloup v. Port of Mobile,
127 U. S. 640.

It, of course, must be conceded that if the legislative assembly of Montana is without power to impose such a license tax, the imposition of such tax is in violation of Section 10, of Article I, of the Constitution of the United States, for the reason that it impairs the contract of appellee, resulting from the acceptance of the grant by the construction of its telephone system. Furthermore, the acts, by failing to "give full effect" to Section 14, of Article XV, of the Montana Constitution, is in violation of that section.

Assuming, for the purposes of this argument, however, that in spite of the mandatory provisions of the Constitution, the Legislature has the power to impose a license for the doing of a telephone business, nevertheless the acts in question violate this provision, for the reason that neither is a "general law of uniform operation." This constitutional

provision must necessarily embrace all telephone lines, including those which are excluded by the acts in question. Section 14, of Article XV, of the Montana Constitution, can only mean that any law affecting those operating telephone lines must apply to all telephone lines.

State v. City of Helena, supra.

This constitutional provision having made a classification of all telephone lines, the legislative assembly is without authority to make any different classification, or to exclude from the operation of the acts the other telephone companies.

V.

THE ACTS VIOLATE SECTION 10, OF ARTICLE XII, OF THE MONTANA CONSTITUTION, IN THAT THEY DIRECT THE TREASURER OF THE STATE OF MONTANA TO PAY MONEYS OUT OF THE TREASURY OF THE STATE WITHOUT SPECIFIC APPROPRIATIONS HAVING BEEN MADE THEREFOR BY LAW.

The original act required the company to pay this money to the State Treasurer, and he in turn was required to apportion it to the county treasurers, according to the number of telephone instruments in use from time to time in the respective counties of the state. The amended act requires him to credit the moneys to the Emergency Relief Fund. The Montana Constitution, Section 10, Article XII, provides:

> "All taxes levied for state purposes shall be paid into the state treasury, and no money shall be drawn from the treasury but in pursuance of specific appropriations made by law."

The Supreme Court of Montana, in *State v. State Board Examiners*, 74 Mont. 1, 238 Pac. 316, at 321, defined a "specific appropriation" as follows:

> "A 'specific' appropriation is defined in 36 Cyc. 892 as follows: 'A specific appropriation is an act by which a named sum of money is set apart in the treasury and devoted to the payment of particular claims or demands. The appropriation must be specific as to the amount or fund appropriated, and as to the object for which the appropriation is made, it being sufficient, however, if the amount is capable of being determined, and it is not essential that the amount be certainly ascertained prior to the appropriation.'"

Appellants apparently concede that the acts make an "appropriation." That the appropriation cannot be said to be specific, either as to the amount or fund appropriated, or as to the object for which the appropriation is made, is apparent. Under the original act, the determination of the object for which the appropriation is made was left for the counties to determine. Under the act as amended, the determination of the object for which the appropriation is made is left to those having charge of the Emergency Relief Fund. That the amount of the appropriation is indefinite, and, therefore, not specific, is readily evident, for it would be impossible for even the appellee to undertake to predict the number of telephones within the state during the ensuing year, which would be subject to the license tax. By Article III, Section 29, of the Montana Constitution, it is stated that the provisions of the state Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.

VI.

THE ACT AS AMENDED VIOLATES THE MONTANA CONSTITUTION, BECAUSE THE AMOUNT THEREBY APPROPRIATED AND TO BE CREDITED TO THE EMERGENCY RELIEF FUND IS NOT SPECIFIED, AS REQUIRED BY SECTION 10, OF ARTICLE XII.

The act as amended further violates Section 10, Article XII, of the Montana Constitution, in that the amount thereby appropriated that is to be credited to the Emergency Relief Fund, is not specified, but that amount is apparently left to be determined by the Governor of the state. In *Re Pomeroy*, 51 Mont. 119, 151 Pac. 333, the Supreme Court of Montana had under consideration a statute which directed that if a lawful claimant establish his title to money held by the state in its treasury, and claimed by it as an escheat, the judgment in the proceeding should order the auditor to draw his warrant on the treasury for the payment of the same. The court held this statute unconstitutional, as violative of Section 34, Article V, holding that while there appeared "to be no objection to the statute in so far as it authorizes the petitioner to establish his right to the property as a claim against the state which in equity and good conscience it ought to discharge," it should be left "to subsequent legislative assemblies to provide by adequate appropriations for such claims as they arise and are adjudicated."

In *Peabody v. Russell*, 302 Ill. 111, 134 N. E. 150, the Supreme Court of Illinois had under consideration a statute which attempted to appropriate $500,000.00 for "reserves" to be expended by the Director of Finance on the approval of the Governor. The court held this unconstitutional, as

violative of Article V, Section 16, of the Illinois Constitution, requiring appropriation bills to specify the objects and purposes for which made, and also upon the ground that it sought to delegate to an administrative officer the specification of objects and purposes, and the determination of distinct items therefor.

See also *Journal Publishing Co. v. Kenney*, 9 Mont. 389, 24 Pac. 96.

VII.

THE ACTS ARE SPECIAL LAWS FOR THE ASSESSMENT OR COLLECTION OF TAXES, IN VIOLATION OF ARTICLE V, SECTION 26, OF THE MONTANA CONSTITUTION.

Article V, Section 26, of the Montana Constitution, provides:

> "The legislative assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * for the collection or assessment of taxes * * * ."

The practical operation of the acts under consideration is such that they affect only fourteen of the sixty-four telephone companies operating in Montana. The acts, therefore, while general in form, are special in effect.

In *Ark-Ash Lumber Co. v. Pride and Fairley*, 162 Ark. 235, 258 S. W. 335, at 336, the Supreme Court of Arkansas, in considering a statute of this nature, which appears to be general in form, but special in effect, said:

> "In determining whether a law is public, general, special, or local, the courts will look to its substance and practical operation, rather than to its title, form or phraseology, because otherwise prohibitions of the fun-

damental law against special legislation would be nugatory."

The Supreme Court of Montana has said that it is not what a statute includes that determines whether or not it is a special law, but that it is what it excludes.

In *State v. Hays*, 86 Mont. 58, 282 Pac. 32, at 36, it defined a special statute as follows:

> "A special statute is one which relates to particular persons or things of a class (In Re Church, 92 N. W. 1) or one made for individual cases and for less than a class (Guthrie Daily Leader v. Cameron, 3 Okla. 377, 41 Pac. 635), or one which relates and applies to particular members of a class, either particularized by the express terms of the act, or separated by any method of selection from the whole class to which the law might but for such limitation be applicable (State v. Cooley, 56 Minn. 540, 58 N. W. 150).
>
> "The test of a special statute is the appropriateness of its provisions and the objects that it excludes. It is not, therefore, what a law includes, but what it excludes that determines whether it is special. Budd v. Hancock, 66 N. J. Law, 133, 48 Atl. 1023."

While in that case, the statute under consideration was held not to be a special law, in *State ex rel. Redman v. Meyers*, 65 Mont. 124, 210 Pac. 1064, the court held a statute void as special legislation, which operated only upon existing districts, divided by the creation of new counties, as have been, or might be created, under certain enumerated statutes, and impliedly excluded from its operation all existing districts which had been, or might be, divided by the creation of counties by direct legislative act.

In *State v. Miksicek*, 225 Mo. 561, 125 S. W. 507, the Supreme Court of Missouri had under consideration a statute which regulated the hours of labor permitted in a bis-

cuit, bread, or cake bakery or confectionery establishment. The court held that since the statute had no application to pie and pastry bakeries and confectioneries, or to cracker bakeries, it was a special statute, and, therefore, unconstitutional. The court, in quoting from an earlier decision, said:

> "The legislature may legislate in regard to a class of persons, but they cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes and enact different rules for the government of each."

In *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 55 S. W. 627, 48 L. R. A. 265, that same court held unconstitutional a statute which, by an ingenious method of classification such as was resorted to in the Montana acts under consideration, required department stores to pay considerably larger fees or taxes than other stores. The court said:

> "While the legislature, under its vested authority and power, may arbitrarily impose taxes, restraints, and burdens of various kinds, within the constitutional limitations prescribed, that may become most onerous and oppressive to the citizen, which the courts can do naught but uphold, it cannot create conditions or fiat classes that will operate to make legislation alone applicable to those artificial conditions and classes as general law within the meaning of the Constitution, or that will entitle it to the designation of 'the law of the land,' or that will make the act 'due process of law' by which alone the liberty of the citizen may be restrained, or his property burdened or disposed of. * * * Such classification is wholly without reason or necessity."

A constitutional provision of this character embraces not only general taxes, but it embraces every method of raising money by the exercise of the power of taxation, and includes license taxes.

Pedro v. Grootemaat,
174 Wis. 412, 183 N. W. 153;
State v. Ashbrook, supra.

Other cases in which the courts have held acts of this character void, because they are a special law, are:

State v. Baltimore & Ohio R. Co.,
113 Md. 179, 77 Atl. 433;

Guthrie Daily Leader v. Cameron,
3 Okla. 377, 41 Pac. 635;

Board of Commissioners of Red River Bridge District v. Wood, 183 Ark. 1082, 40 S. W. (2nd) 435.

VIII.

THE ACT AS AMENDED VIOLATES SECTION 5, OF ARTICLE X, OF THE MONTANA CONSTITUTION, WHICH PROVIDES THAT COUNTIES SHALL PROVIDE SUCH RELIEF AS IS CONTEMPLATED BY THE ACT, AND SUCH PROVISIONS OF THE CONSTITUTION ARE MANDATORY AND PROHIBITORY.

Section 5, Article X, of the Montana Constitution, provides:

> "The several counties of the state shall provide as may be prescribed by law for those inhabitants, who, by reason of age, infirmity or misfortune, may have claims upon the sympathy and aid of society."

Section 29, of Article III, of the Montana Constitution, provides:

> "The provisions of this constitution are mandatory and prohibitory unless by express words they are declared to be otherwise."

The act as amended provides that 95 per cent of the license fees shall be credited by the state treasurer

> "to the Emergency Relief Fund until such time as the Governor may issue a proclamation to the effect that the same is no longer required for such Emergency Relief Fund and after the issuance of such proclamation said 95 per cent of said license fees shall be by such state treasurer credited to the General Fund of the state."

By Chapter 56 of the Laws of the Extraordinary Session of 1933-34, there was appropriated out of the Emergency Relief Fund the sum of $750,000.00, or so much thereof as may be necessary.

Section 2 of that act provides that:

> "The funds herein appropriated shall be administered by the Montana Relief Commission under the authority and provisions of Chapter 20 of the Laws of the Extraordinary Session of 1933, and under the same rules and regulations provided by such Commission for the administering of Federal Relief Funds, and for providing the means of employment for the unemployed. • • •"

Chapter 20 of the Laws of the Extraordinary Session, which is mentioned in Chapter 56, provides as follows:

> "Section 1. There is hereby created a state institution to be known as Emergency Relief, the purpose of which shall be to provide means for the sustenance of life and the relief of distress among people of the state whom economic conditions, industrial inactivity, or other cause over which they have no control has deprived of support.
>
> "Section 2. There is hereby created, and the proper and usual officers of the state are hereby directed to set up and establish, a fund to be known as Emergency Relief Fund to which shall be distributed such moneys

as are provided therefor by the Legislative Assembly.

"Section 3. The Montana Relief Commission is hereby authorized and it shall be the duty of that Commission to administer the fund herein created, and to administer the Emergency Relief as a state institution in such manner as to effectuate the purpose of this Act as herein set forth.

"Section 4. The institution herein created and the fund herein directed to be set up shall lapse, and the authority of the Montana Relief Commission with relation thereto, shall cease, at such time as shall hereafter be specified by the Legislative Assembly."

It thus appears that 95 per cent of the tax is imposed for the purpose of providing funds for "the sustenance of life and the relief of distress among the people of the state whom economic conditions, industrial inactivity, or other cause over which they have no control has deprived of support."

The furnishing of such relief is a duty imposed by Section 5, of Article X, of the Constitution, upon the counties of the state, and is not a function to be discharged by the state.

State v. Gowdy,
62 Mont. 119, 203 Pac. 1115;

Jones v. Cooney,
81 Mont. 340, 263 Pac. 429.

See also:

Walker v. Bedford,
93 Colo. 400, 26 Pac. (2nd) 1051.

Appellants endeavor to justify the act on the ground of an emergency, and on the fact that, irrespective of the constitutional provisions, the state has the power to enact such

legislation as this under the police power. Finally, they suggest that the objectionable part "may be amended by striking out invalidating provisions, or supplying others to make it conform to constitutional requirements." The latter is, of course, so clearly the function of the Legislature, and not a function which may be discharged by the court, that it needs no refutation.

The assertion that the police power of the state extends to an act of this kind is well answered in a statement by the Montana Supreme Court in *State v. Gowdy, supra*, where it said:

> "There is nothing whatsoever embraced in either the title of the act or the body thereof to indicate an intention to exercise the police power of the state, and the act itself expressly denominates the assessment as 'a tax' and it must be conceded to have all the characteristics of a tax. It is a charge imposed by the Legislature for purposes of revenue and it is an enforced proportional contribution levied by the state for county purposes."

Little heed need be paid to the contention that the act is justifiable as an emergency measure. The act does not purport to be of such character, but even if it contained any recitals that it was an emergency measure, that would not justify any court in holding an unconstitutional act valid.

In response to a similar contention that was made in *Walker v. Bedford, supra*, the Supreme Court of Colorado said:

> "We pronounce as the most certain of law that there has never been and can never be an emergency confronting the state that will warrant the servants of the constitution waiving so much as a word of its provisions."

We have heretofore considered the question of severability (Page 47), and noted the rule that the presumption is against the severability of a statute of this character. Therefore, the unconstitutionality of this provision renders the entire act invalid.

IX.

THE ACT AS AMENDED DELEGATES LEGISLATIVE POWER TO THE GOVERNOR, CONTRARY TO SECTION 1, OF ARTICLE IV, OF THE MONTANA CONSTITUTION, IN THAT HE IS AUTHORIZED TO DETERMINE THE AMOUNT OF THE TAX TO BE CREDITED TO THE EMERGENCY RELIEF FUND AND DECLARE BY PROCLAMATION WHEN SAID MONEY SHALL NO LONGER BE REQUIRED FOR SAID PURPOSE.

We feel that the issues heretofore presented are conclusive upon the invalidity of the acts in question. The act as amended, however, would seem to further violate the Montana Constitution, in that it unlawfully delegates to the Governor the legislative power of making an appropriation as it is ordinarily defined.

4 *Corpus Juris*, pp. 1457, 1458, 1460.

In the *Veto case*, 69 Mont. 325, 222 Pac. 428, the Montana Supreme Court said:

> "The executive, in every republican form of government, has only a qualified and destructive legislative function and never creative legislative power."

CONCLUSION

In conclusion, we point out again that the appellee has paid the usual property taxes in Montana, and also pays the corporation license or occupation taxes on the basis of a

percentage of its intrastate revenues (R. 25), and that the appellee, along with the comparatively few other telephone companies out of many, has been singled out for two large license taxes payable in the year 1934, and that these license taxes are levied upon the privilege of engaging in, or carrying on, the business of constructing, maintaining and operating telephone lines and telephone instruments within the State of Montana, and, specifically, upon the telephone instruments in the acts identified and described, and that such business as conducted by the appellee is both intrastate and interstate in character, and the telephone lines and telephone instruments are used in common for both classes of service; that no discrimination has been made in the acts as between the two classes of service, and, indeed, none could be made, since the tax is laid specifically upon instrumentalities used in common for both services. For the reasons set forth in this brief, we respectfully submit that these acts violate the several provisions of the Constitution of the United States and the Constitution of the State of Montana, and the judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX

CHAPTER 174, LAWS OF MONTANA, 1933, TWENTY-THIRD SESSION.

An Act Requiring Every Person, Firm, Copartnership, Association, Joint Stock Company, Syndicate and Corporation Engaged in or Carrying on the Business of Constructing, Maintaining and Operating Telephone Lines and Telephone Instruments Within the State of Montana to Pay License Taxes and Providing Penalties.

Be it enacted by the Legislative Assembly of the State of Montana:

Section 1. Every person, firm, copartnership, association, joint stock company, syndicate and corporation engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana, whether as owner, lessee, trustee or receiver or in any other capacity, shall pay in to the State Treasurer on or before the first day of January each year a license tax in the amounts following for each telephone instrument used, controlled and operated by it in the conduct of such business, based upon the number of telephone instruments owned, controlled and operated by it during all or any part of the calendar year, to-wit: On the first twenty (20) telephone instruments or less a license tax of Ten Cents (10c) per phone; from twenty (20) to seventy-five (75) such instruments a license tax of Twenty Cents (20c) per phone, and on all above seventy-five (75) a license tax of One Dollar ($1.00) for each such instrument. The license tax so paid shall in no manner affect the rates charged to the patrons and users of such telephone instruments, but shall be borne entirely by the owning and operating concern. Provided, the

tax herein provided for shall not be imposed on any telephone instrument where the rate charged the customer therefor does not exceed Two Dollars ($2.00) per month for residence phone, or Three Dollars ($3.00) per month for business house or office phone.

Section 2. A telephone instrument is hereby defined to be a transmitter and receiver capable of use in the transmitting and receiving of telephone communications.

Section 3. Any violation of any of the provisions of this Act shall be deemed a misdemeanor and shall be punished by fine of not more than One Thousand Dollars ($1,000) or by imprisonment in the county jail not exceeding six (6) months, or by both such fine and imprisonment.

Section 4. All license fees paid to the State Treasurer under the provisions of this Act shall be by him, before the end of each fiscal year, divided by the counties in this state according to the number of telephone instruments in use from time to time in the respective counties of the state and on each such computation and division the State Treasurer shall transmit the share of each county to the County Treasurer thereof, for the use and benefit of the county general fund.

Section 5. This Act shall be in full force and effect from and after its passage and approval.

Approved March 16, 1933.

CHAPTER 54, LAWS OF MONTANA, 1933-34, TWENTY-THIRD EXTRAORDINARY SESSION.

An Act Amending Section 1, and Section 4, of Chapter 174, of the Session Laws of 1933, Requiring Every Person, Firm, Co-partnership, Association, Joint Stock Com-

pany, Syndicate and Corporation Engaged In or Carrying On the Business of Constructing, Maintaining and Operating Telephone Lines and Telephone Instruments Within the State of Montana, to Pay License Taxes and Providing Penalties.

Be It Enacted by the Legislative Assembly of the State of Montana:

Section 1. That Section 1, of Chapter 174, of the Session Laws of 1933, be amended to read as follows:

"Section 1. Every person, firm, co-partnership, association, joint stock company, syndicate and corporation engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana, whether as owner, lessee, trustee or receiver or in any other capacity, shall pay in to the State Treasurer on or before the first day of March each year a license tax in the amounts following for each telephone instrument used, controlled and operated by it in the conduct of such business:

"A license tax of Two Dollars ($2.00) for each such instrument.

"No bill, statement or account rendered or given any customer by any telephone company shall set out or contain, as a separate item, any amount on account or by reason of the license tax imposed by this Act. Every person, firm, co-partnership, association, joint stock company, syndicate or any corporation affected by the provisions of this Act shall be permitted to claim as exempt from the tax imposed by this Act any telephone instrument where the rate charged the customer therefor does not exceed Two Dollars ($2.00) per month for residence phone, or Four Dollars ($4.00) per month for business house or office phone. Provided further, that the provisions of this Act shall not ap-

ply to mutual telephone companies or lines not organized or used or operated for private or corporate gain."

Section 2. That Section 4, of Chapter 174, of the Session Laws of 1933, be amended to read as follows:

"Section 4. Five per centum (5%) of the license fees paid to the State Treasurer under this Act are hereby appropriated and shall be set aside by him for the purpose of defraying the cost of administering this Act by the State Board of Equalization, and the remaining ninety-five per centum (95%) thereof shall be by him credited to the Emergency Relief Fund until such time as the Governor may issue a proclamation to the effect that the same is no longer required for such Emergency Relief Fund, and after the issuance of such proclamation said ninety-five per centum (95%) of such license fees shall be by such State Treasurer credited to the General Fund of the State."

Section 3. No tax which has attached, accrued, or become due or payable under the provisions of Chapter 174, Session Laws, 1933, shall be released or waived by the passage or approval of this Act but the same shall be paid as provided in said Chapter before its amendment by this Act.

Section 4. This Act shall be in full force and effect from and after its passage and approval.

Approved Jan. 20, 1934.

SUPREME COURT OF THE UNITED STATES.

No. 423.—October Term, 1934.

Frank H. Cooney, as Governor of the State of Montana, et al., etc., Appellants, *vs.* The Mountain States Telephone and Telegraph Company.	Appeal from the District Court of the United States for the District of Montana.

[March 4, 1935.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The Mountain States Telephone and Telegraph Company brought this suit to restrain the enforcement of two acts of the legislature of Montana imposing annual license taxes. The first act is Chapter 174 of the Laws of 1933 prescribing a tax, to be paid on or before January first, for each telephone instrument used in the conduct of the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana. The tax is not to be imposed on telephone instruments where the rate charged to the customer does not exceed specified monthly amounts. The second act, Chapter 54 of the Laws of 1933-34, amended the first act with respect to the amount of the tax, the date of payment, and other particulars, and continued the first act in force as to taxes already accrued. The text of the acts is set forth in the margin.[1]

[1]Chapter 174 of the Laws of 1933, approved March 16, 1933, provides:

"Section 1. Every person, firm, copartnership, association, joint stock company, syndicate and corporation engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana, whether as owner, lessee, trustee or receiver or in any other capacity, shall pay in to the State Treasurer on or before the first day of January each year a license tax in the amounts following for each telephone instrument used, controlled and operated by it in the conduct of such business, based upon the number of telephone instruments owned, controlled and operated by it during all or any part of the calendar year, to-wit: On the first twenty (20) telephone instruments or less a license tax of Ten Cents (10¢) per telephone;

The acts were assailed as repugnant to both the federal and state constitutions. One of these grounds, that the acts were invalid under the commerce clause of the Federal Constitution, was sustained by the District Court of three judges (28 U. S. C. 380) which entered a final decree permanently enjoining enforcement. 7 F. Supp. 12. The defendants, state officers, bring this appeal.

The District Court received evidence and made findings of fact substantially as follows: Plaintiff is a Colorado corporation operating a statewide telephone system in Montana; it furnishes telephone service of an interstate and intrastate character; its system extends throughout Montana, Idaho, Utah, Wyoming, Colorado,

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from twenty (20) to seventy-five (75) such instruments a license tax of Twenty Cents (20¢) per phone, and on all above seventy-five (75) a license tax of One Dollar ($1.00) for each such instrument. The license tax so paid shall in no manner affect the rates charged to the patrons and users of such telephone instruments, but shall be borne entirely by the owning and operating concern. Provided, the tax herein provided for shall not be imposed on any telephone instrument where the rate charged the customer therefor does not exceed Two Dollars ($2.00) per month for residence phone, or Three Dollars ($3.00) per month for business house or office phone.

"Section 2. A telephone instrument is hereby defined to be a transmitter and receiver capable of use in the transmitting and receiving of telephone communications.

"Section 3. Any violation of any of the provisions of this Act shall be deemed a misdemeanor and shall be punished by fine of not more than One Thousand Dollars ($1,000) or by imprisonment in the county jail not exceeding six (6) months, or by both such fine and imprisonment.

"Section 4. All license fees paid to the State Treasurer under the provisions of this Act shall be by him, before the end of each fiscal year, divided by the counties in this state according to the number of telephone instruments in use from time to time in the respective counties of the state and on each such computation and division the State Treasurer shall transmit the share of each county to the County Treasurer thereof, for the use and benefit of the county general fund.

"Section 5. This Act shall be in full force and effect from and after its passage and approval".

The amending act (Chapter 54 of the Laws of 1933-34) approved January 20, 1934, provides:

"Section 1. That Section 1, of Chapter 174, of the Session Laws of 1933, be amended to read as follows:

"Section 1. Every person, firm, co-partnership, association, joint stock company, syndicate and corporation engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana, whether as owner, lessee, trustee or receiver or in any other capacity, shall pay in to the State Treasurer on or before the first day of March each

Arizona, New Mexico, and a part of Texas; its telephone instruments in Montana are an integral part of its system, and are a part of a still greater system extending throughout the United States and to many foreign countries, so that each of the telephones in Montana (except 45 not affected by the statute) is available for interstate and foreign communication by connection with many millions of telephones; the statute in question affects over 34,000 of the telephones in Montana, and, of these, more than 10,000 have actually been used in interstate and foreign commerce since the statute was enacted, and it is reasonably likely that all plaintiff's telephone instruments in Montana will be so used; plaintiff pays the usual property taxes in Montana and also the corporation license or occupation taxes, which are a percentage of its intrastate revenues;

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year a license tax in the amounts following for each telephone instrument used, controlled and operated by it in the conduct of such business:

"A license tax of Two Dollars ($2.00) for each such instrument.

"No bill, statement or account rendered or given any customer by any telephone company shall set out or contain, as a separate item, any amount on account or by reason of the license tax imposed by this Act. Every person, firm, co-partnership, association, joint stock company, syndicate or any corporation affected by the provisions of this Act shall be permitted to claim as exempt from the tax imposed by this Act any telephone instrument where the rate charged the customer therefor does not exceed Two Dollars ($2.00) per month for residence phone, or Four Dollars ($4.00) per month for business house or office phone. Provided further, that the provisions of this Act shall not apply to mutual telephone companies or lines not organized or used or operated for private or corporate gain.

"Section 2. That Section 4, of Chapter 174, of the Session Laws of 1933, be amended to read as follows:

"Section 4. Five per centum (5%) of the license fees paid to the State Treasurer under this Act are hereby appropriated and shall be set aside by him for the purpose of defraying the cost of administering this Act by the State Board of Equalization, and the remaining ninety-five per centum (95%) thereof shall be by him credited to the Emergency Relief Fund until such time as the Governor may issue a proclamation to the effect that the same is no longer required for such Emergency Relief Fund, and after the issuance of such proclamation said ninety-five per centum (95%) of such license fees shall be by such State Treasurer credited to the General Fund of the State".

"Section 3. No tax which has attached, accrued or become due or payable under the provisions of Chapter 174, Session Laws, 1933, shall be released or waived by the passage or approval of this Act but the same shall be paid as provided in said Chapter before its amendment by this Act.

"Section 4. This Act shall be in full force and effect from and after its passage and approval".

all its telephones are instrumentalities of interstate and foreign commerce and plaintiff "could not discontinue its intrastate business and operations in Montana without virtually destroying and being compelled to abandon and withdraw from its interstate and foreign business".

Appellants contend that the taxes are imposed solely upon intrastate commerce and do not burden interstate commerce. They insist that the taxes are laid upon the intrastate business measured by the number of telephones in intrastate use. Appellants challenge the findings that all of appellee's telephones in Montana are instrumentalities of interstate and foreign commerce, and that appellee could not discontinue its intrastate business without being compelled to withdraw from its interstate and foreign business, as being unsupported by the evidence.

1. It does not appear that these acts have been construed by any decision of the state courts. Appellants cite a decision of the Supreme Court of Montana construing Section 4071 of the Political Code of 1895, as amended by the laws of 1897, p. 202, which provided for a tax on telephone companies doing business in the State of a certain amount per year for each instrument in use. *State* v. *Rocky Mountain Bell Telephone Co.*, 27 Mont. 394. In view of the terms of that statute, the court concluded that the legislature intended to impose a license tax "on each telephone instrument used in purely local or intrastate business, and that as to instruments used in interstate business it was intended to have no application whatever". *Id.*, p. 404. (Compare *Ogden City* v. *Crossman*, 17 Utah 66.) A few days later, the Supreme Court of Montana decided the case of *State* v. *Northern Pacific Express Company*, 27 Mont. 419, and held that the occupation tax imposed by Section 4074 of the Political Code of the State, as applied to an express company, offended against the commerce clause of the Federal Constitution. The court distinguished its ruling in the case of the *Rocky Mountain Bell Telephone Company* because the statute there "by express terms" had discriminated "between local and interstate commerce" and the intention that "only local business" should be subject to the license tax "was clearly expressed". The court thus stated the principle which it considered to be applicable (*id.*, p. 422): "If, however, the terms of the statute are general, and the license fee a unit charged against the business of the carrier as such,—as strictly an

occupation tax,—and no attempt is made by the language of the statute to discriminate between the local and interstate business, but the license is required as a condition precedent to the carrier's commencing or conducting business, then the imposition of the tax will be deemed an interference with and an attempt to regulate interstate commerce, and for that reason void". Applying that principle, the court found the tax upon the express company to be invalid as the statute did not "by its terms attempt to make any discrimination between the local and interstate business of the defendant company, and no such discrimination can be made under any fair construction of the language employed". *Id.*, p. 427. It is evident that these decisions of the state court do not aid appellants' contention.

The tax is a privilege, or occupation, tax. The terms of the acts are explicit with respect to the incidence of the tax. Chapter 174 of the Laws of 1933 provides that every corporation "engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana . . . shall pay . . . a license tax . . . for each telephone instrument used, controlled and operated by it in the conduct of such business". The business is the maintaining of telephone lines and the furnishing of telephone service in the State. No distinction is made between interstate and intrastate service. The tax is then stated to be "for each telephone instrument used, controlled and operated". Again, there is no limitation as to use, control or operation in intrastate business. The tax is "based upon the number of telephone instruments owned, controlled and operated" during all or any part of the calendar year. A "telephone instrument" is defined in section two of the act as "a transmitter and receiver capable of use in the transmitting and receiving of telephone communications". The tax is thus laid simply by reason of the fact that the company is furnishing telephone service and is based upon the number of telephone instruments used in that service without regard to its character whether intrastate or interstate. The provision of the second tax act, Chapter 54 of the Laws of 1933-34, is in this respect substantially the same.

To support their contention, appellants point to the proviso, in the first act, that the tax "shall not be imposed on any telephone instrument where the rate charged the customer therefor does not exceed Two Dollars ($2.00) per month for residence

phone, or Three Dollars ($3.00) per month for business house or office phone". There is a corresponding exclusion in the second act.[2] But these are merely exempting provisions. They carve out of the statute telephone instruments for which certain monthly rates are paid. The question is not as to the instruments that are not taxed, but as to those which are taxed. All the telephone instruments, not excepted, whether they are used in intrastate or interstate commerce and however the service is paid for, are left subject to the tax. It is urged that monthly rates are charged to the customer for merely local service and are distinct from toll rates or charges for long distance calls which, whether intrastate or interstate, are on a "board to board" basis. But the tax is not laid on revenues. It is not laid on revenue derived from monthly rates as distinguished from toll charges. It is not imposed with respect either to the nature of the revenue, or to the character of the service from which the revenue is derived, or to the manner in which the charges for the service are fixed.

The evidence supports the findings that these telephone instruments are available for interstate and foreign communications. Appellants contend that a "potential use, or even an occasional use for interstate or foreign commerce, is too remote, indefinite and indirect to permit such instruments to be classified as instrumentalities of interstate or foreign commerce, when, in fact, such instruments are used exclusively or almost exclusively for intrastate commerce." But the telephone instruments constitute a class of facilities, which, as such, are subject to the tax, and the findings, based on evidence, show that the interstate use is actual, not merely potential; substantial, not negligible. More than 10,000 of these instruments have actually been used in interstate and foreign commerce since the tax was laid. The evidence also shows that the same telephones; the same signaling apparatus, the same wires, land, buildings, central office equipment, and operating organization are used in common for all services, interstate as well as intrastate. It was in this view that the District Court held that it was not feasible to provide separate statewide systems for intrastate and interstate telephones. But, apart from that question, it appears that in the operation of this unified system, the telephone instruments are the means by which the customers com-

[2]See Note 1.

mand at their pleasure the service they desire whether intrastate or interstate. And, so far as the instruments are not excepted, the tax is laid indiscriminately with respect to each of these facilities, regardless of the nature of their use.

2. There is no question that the State may require payment of an occupation tax from one engaged in both intrastate and interstate commerce.[3] But a State cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it.[4] And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination. *Leloup* v. *Mobile*, 127 U. S. 640. There are "sufficient modes" in which the local business may be taxed without the imposition of a tax "which covers the entire operations". *Id.*, p. 647. *See Williams* v. *Talladega*, 226 U. S. 404, 419. Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter: that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business. *Sprout* v. *South Bend*, 277 U. S. 163, 171; *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470.

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[3]Ratterman *v.* Western Union Telegraph Co., 127 U. S. 411; Pacific Express Co. *v.* Seibert, 142 U. S. 339; Lehigh Valley R. R. Co. *v.* Pennsylvania, 145 U. S. 192; Postal Telegraph Cable Co. *v.* Charlestown, 153 U. S. 692; Osborne *v.* Florida, 164 U. S. 650; Pullman Company *v.* Adams, 189 U. S. 420; Allen *v.* Pullman Company, 191 U. S. 171; Kehrer *v.* Stewart, 197 U. S. 60; Ohio Tax Cases, 232 U. S. 576; St. Louis Southwestern Rwy. Co. *v.* Arkansas, 235 U. S. 350; People ex rel. Cornell Steamboat Co. *v.* Sohmer, 235 U. S. 549; Postal Telegraph Cable Co. *v.* Richmond, 249 U. S. 252; Postal Telegraph Cable Co. *v.* Fremont, 255 U. S. 124; Raley & Bros. *v.* Richardson, 264 U. S. 157; East Ohio Gas Co. *v.* Tax Commission, 283 U. S. 465.

[4]State Freight Tax Case, 15 Wall. 232; Picard *v.* Pullman Southern Car Co., 117 U. S. 34; Robbins *v.* Shelby Taxing District, 120 U. S. 489; Philadelphia & Southern S. S. Co. *v.* Pennsylvania, 122 U. S. 326; Leloup *v.* Mobile, 127 U. S. 640; Crutcher *v.* Kentucky, 141 U. S. 47; Adams Express Co. *v.* New York, 232 U. S. 14; Bowman *v.* Continental Oil Company, 256 U. S. 642; Sprout *v.* South Bend, 277 U. S. 163, 171; New Jersey Bell Telephone Co. *v.* State Board of Taxes, 280 U. S. 338.

A privilege or occupation tax which a State imposes with respect to both interstate and intrastate business, through an indiscriminate application to instrumentalities common to both sorts of commerce, has frequently been held to be invalid. *Leloup* v. *Mobile, supra; Picard* v. *Pullman Southern Car Co.*, 117 U. S. 34, 46; *Crutcher* v. *Kentucky*, 141 U. S. 47, 59; *Adams Express Company* v. *New York*, 232 N. Y. 14, 29, 31; *United States Express Company* v. *New York*, 232 U. S. 35, 36; *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 647, 648. In the cases of the express companies, the principle was applied to a privilege tax imposed alike with respect to wagons used in the movement of both interstate and intrastate shipments. The local shipments "were handled in the same vehicles, and by the same men" that were employed in connection with the interstate transportation and it was impracticable to effect a separation. *Adams Express Co.* v. *New York, supra; United States Express Co.* v. *New York, supra.* In *Bowman* v. *Continental Oil Company, supra*, the question arose under a statute of New Mexico laying an annual license tax of fifty dollars for each station distributing gasoline. The Court pointed out the distinction between an excise tax on sales of gasoline where, as the subject matter was separable, full protection could be afforded by enjoining enforcement as to the interstate business, and the license tax which with its prohibition fell upon the business as a whole. The Court said: "But with the license tax it is otherwise. If the statute is inseparable, then both by its terms and by its legal operation and effect this tax is imposed generally upon the entire business conducted, including interstate commerce as well as domestic; and the tax is void". The difficulty, continued the Court, "is that, since plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce unless it be enforced otherwise than as prescribed by the statute—that is to say, without authority of law. Hence, it cannot be enforced at all".

In the instant case, the tax, being indivisible and indiscriminate in its application, necessarily burdens interstate commerce. We do not pass upon the other questions presented.

Decree affirmed.